

BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR OF THE STATE OF
ALABAMA

FOR THE PERIOD

FROM OCTOBER 1, 1918
TO SEPTEMBER 30, 1920

J. Q. SMITH.....Attorney General

LAWRENCE E. BROWN.....Special Assistant Attorney General
(January 21, 1919, to February 16, 1920; since the latter date Mr.
Brown has been retained to continue the handling of income tax
cases, gasoline inspection cases, coal and ore tonnage tax cases, and
Atlantic Coast Line franchise tax case.)

HORACE C. WILKINSON.....Special Assistant Attorney General
(February 1, 1919, to August 18, 1919)

RICHARD V. EVANS.....Special Assistant Attorney General
(January 21, 1919, to November 22, 1919)

LAMAR FIELD.....Special Assistant Attorney General
(Appointed October 1, 1919)

HARWELL G. DAVIS.....Special Assistant Attorney General
(Appointed December 1, 1919)

HENRY P. WHITE.....Special Assistant Attorney General
(Appointed March 8, 1920)

MISS BERNICE SUMMERS.....Clerk

MISS MINNIE L. ANDERSON.....Stenographer

F. LOYD TATE.....Attorney General
(October 1, 1918, to November 18, 1918)

DAVID W. W. FULLER.....Assistant Attorney General
(October 1, 1918, to January 20, 1919)

EMMET S. THIGPEN.....Special Assistant Attorney General
(October 1, 1918, to November 18, 1918)

EMMET S. THIGPEN.....Attorney General
(November 18, 1918, to January 20, 1919)

ATTORNEYS GENERAL OF ALABAMA

1819-1920

Henry Hitchcock	1819
Thomas White	1823
Constantine Perkins	1825
Peter Martin	1832
Alexander B. Meek	1836
John D. Phelan	1836
Lincoln Clarke	1838
Matthew W. Lindsay	1839
Thomas D. Clarke	1843
William H. Martin	1847
Marion A. Baldwin	1850
John W. A. Sanford	1865
Joshua Morse	1868
John W. A. Sanford	1870
Benjamin Gardner	1872
John W. A. Sanford	1874
Henry C. Tompkins	1878
Thomas N. McClellan	1884
William L. Martin	1889
William C. Fitts	1894
Charles G. Brown	1898
Massey Wilson	1903
Alexander M. Garber	1907
Robert C. Brickell	1911
William L. Martin (Jr.)	1915
F. Loyd Tate*	1918
Emmet S. Thigpen†	1918
J. Q. Smith	1919

Note: For many years, and until Feb. 20, 1866, the law required the Attorney General to act as Solicitor for the Circuit in which the seat of government was located.

*Appointed by Governor Henderson, January 1, 1918.

†Appointed by Governor Henderson, November 18, 1918.

LIST OF CIRCUIT JUDGES AND SOLICITORS

1st Circuit.—Choctaw, Washington and Clarke Counties. Judge Ben D. Turner, Chatom; Solicitor, F. E. Poole, Grove Hill.

2nd Circuit.—Butler, Crenshaw and Lowndes Counties. Judge A. E. Gamble, Greenville; Solicitor, W. H. Stoddard, Luverne.

3rd Circuit.—Barbour, Bullock, Dale and Russell Counties. Judge J. S. Williams, Clayton; Solicitor T. M. Patterson, Clayton.

4th Circuit.—Bibb, Dallas, Hale, Perry and Wilcox Counties, Judge B. M. Miller, Camden; Solicitor J. F. Thompson, Centreville.

5th Circuit.—Chambers, Macon, Randolph, Tallapoosa and Lee Counties. Judges S. L. Brewer, Tuskegee and Lum Duke, Opelika; Solicitors W. B. Bowling, Lafayette and C. A. L. Samford, Opelika.

6th Circuit.—Tuscaloosa County.—Judge H. B. Foster, Tuscaloosa; Solicitor E. L. Clarkson, Tuscaloosa.

7th Circuit.—Calhoun, Cleburne and Talladega Counties.—Judge A. P. Agee, Anniston (succeeding H. D. Merrill); Solicitor J. B. Sanford, Talladega.

8th Circuit.—Cullman, Lawrence, Limestone, Madison and Morgan Counties. Judges R. C. Brickell, Huntsville, and Osceola Kyle, Decatur; Solicitor D. C. Almon, Albany.

9th Circuit.—Cherokee, DeKalb, Marshall and Jackson Counties. Judge W. W. Haralson, Ft. Payne; Solicitor A. E. Hawkins, Ft. Payne.

10th Circuit.—Jefferson County. Judges H. A. Locke, W. E. Fort, H. P. Heflin, Romaine Boyd, J. C. B. Gwin, C. B. Smith, J. C. Pugh, Richard V. Evans, D. A. Greene, H. C. Wilkinson, Birmingham; Solicitors Jos. R. Tate, Birmingham and Ben G. Perry, Bessemer.

11th Circuit.—Colbert, Franklin and Lauderdale Counties. Judge Chas. P. Almon, Florence; Solicitor Henry D. Jones, Russellville.

12th Circuit.—Coffee, Covington and Pike Counties. Judge A. B. Foster, Troy; Solicitor R. H. Jones, Andalusia.

13th Circuit.—Mobile County. Judges Saffold Berney, J. W. Goldsby and C. A. Grayson, Mobile; Solicitor Bart B. Chamberlain, Mobile.

14th Circuit.—Walker, Winston, Fayette, Lamar and Marion Counties. Judges J. J. Curtis, Jasper and T. L. Sowell, Jasper; Solicitor J. M. Pennington, Jasper.

15th Circuit.—Montgomery County. Judges Leon McCord, Montgomery and Wm. L. Martin, Montgomery; Solicitor W. T. Seibels, Montgomery.

16th District.—Blount, Etowah and St. Clair Counties. Judges O. A. Steele, Oneonta and Woodson J. Martin, Gadsden. Solicitor M. C. Sivley, Gadsden.

17th Circuit.—Marengo, Greene, Pickens and Sumter Counties. Judge R. I. Jones, Linden; Solicitor B. G. Wilson, Demopolis.

18th Circuit.—Clay, Shelby and Coosa Counties. Judge E. J. Garrison, Ashland; Solicitor W. W. Wallace, Columbiana.

19th Circuit.—Autauga, Chilton and Elmore Counties. Judge B. K. McMorris, Wetumpka; Solicitor C. E. Alexander, Prattville.

20th Circuit.—Geneva, Henry and Houston Counties. Judge H. A. Pearce, Dothan; Solicitor Ernest H. Hill, Dothan.

21st Circuit.—Baldwin, Conecuh, Escambia and Monroe Counties. Judge John D. Leigh, Brewton; Solicitor G. O. Dickey, Evergreen.

LETTER OF TRANSMITTAL

October 1, 1920.

HON. THOS. E. KILBY, Governor
Capitol.

Dear Sir:

As required by the provisions of section 635 of the Code of Alabama, I herewith transmit the biennial report of the Attorney General of Alabama for the period beginning October 1, 1918, and terminating September 30, 1920.

This is the first report from my office during my incumbency, which covers the entire biennial period, with the exception of the period intervening between October 1, 1918, and January 20, 1919, during which period my predecessors were in office.

I am publishing in this report the opinions rendered by Hon. F. Loyd Tate and Hon. Emmet S. Thigpen, who were incumbents of this office between October 1, 1918, and January 20, 1919, their names being signed to the opinions rendered by them.

During the biennial period above referred to, there have been rendered by this office 533 written opinions. Forty-three were rendered by my predecessors, Hon. F. Loyd Tate and Hon. Emmet S. Thigpen. Four hundred and ninety written opinions have been rendered by the Attorney General's office to the various heads of departments and public officers throughout the State. The preparation of these opinions has involved a great deal of study and thought, and I am pleased to be able to say that no opinion rendered by the Attorney General's office during my incumbency has failed to command the approval of the courts whenever such opinion has been brought into question, except in one instance.

Besides the regular duties of the Attorney General, he is by law designated as a member of the Board of Pardons, the Pension Commission, the Budget Commission, the Board of Compromise, the State Securities Commission, and the Alabama State Memorial Commission, and is ex-officio member of the Board of Trustees of the State penal institutions.

I beg to state that I have attended every meeting of the various boards and have performed all of the duties required of me by law, which has been a large task, and has required a large part of my time.

Practically every provision of the prohibition laws passed by the 1919 session of the Legislature has been upheld by the Supreme Court and the Court of Appeals of this State, all legal questions having been settled by the courts of the State. It is now only a question of proper enforcement of said laws by the various officers charged with this duty.

By subdivision 5 of section 635 of the Code, the Attorney General is required to make suggestions pertaining to the suppression of crime, and the improvement of criminal administration, as he may deem proper. The existing laws and those passed by the 1919 session of the Legislature and the extra session of 1920 seem to cover every subject known to criminal jurisprudence, and all that is now needed is a plain, conservative, everyday, honest enforcement of the laws now on the statute books. This matter rests entirely with the officers of the State who are charged with law enforcement, and the law-abiding citizens of Alabama, who are, and always will be, an important factor in law enforcement and good government.

Appended to this report you will find:

1st: Such of the official opinions which have been rendered by this office during the biennial period covered by this report as deal with questions of public interest, or will be of aid to the various officers of the State in the discharge of their duties in the future;

2d: A statement showing the status of suits and claims in which the State is interested, which have demanded the attention of this office;

3d: A tabulated statement showing the number and character of criminal cases disposed of in the entire state for the period of two years covered by this report, together with the disposition of such cases, which also shows the prevalent crime in each county.

Since I assumed office, on January 20, 1919, I have collected judgments and claims due the State of Alabama amounting to the sum of \$216,647.66, which has been paid into the State treasury. The details of these collections will be shown by the Auditor's report.

From January 20, 1919, to September 30, 1919, the expenses of this office were \$17,016.89, and from October 1, 1919, to September 30, 1920, the expenses were \$17,318.69; making a total of \$34,335.58. A detailed statement will be shown by the Auditor's report. This amount does not include the salaries of the Attorney General and two stenographers, which are paid out of the appropriation made for the Executive Department of the State, and not charged to the appropriation of the Attorney General's office.

In submitting my report for the biennial period just ended, I feel that I owe it to the deputies and employees of this office to commend their loyalty to the State, and their devotion to the duty of the position which they hold.

Probably in no previous years has there been transacted in the office of the Attorney General any such amount of important legal business as has been transacted during the past biennial period. A great many difficult and important cases, involving novel and interesting questions of law, have been disposed of, which in the aggregate are highly satisfactory. A description of the most important civil cases is set out elsewhere in this report.

By reference to the general summary of criminal cases set out hereinafter, it will be seen that 10,607 prosecutions were disposed of in the circuit courts of this State during the time covered by this report. Of this number there were 5,689 convictions and 1,319 acquittals; while 497 were abated or withdrawn, and orders of nolle prosequi entered in 3,095. The predominating crime was violating the prohibition law, there being 2,619 prosecutions of this nature.

A comparison with reports covering previous years shows that during the years 1918-20 the number of prosecutions disposed of was 2,503 more than the number disposed of during the years 1916-18; and 12,972 less than the number disposed of during the years 1914-16.

Regard and respect for the laws comes not so much from the severity, as from the certainty of punishment. Defendants in 4,881 cases during the last two years were either not tried or were acquitted. It hardly seems reasonable that so large a number of prosecutions could be instituted without sufficient testimony to convict.

There have been disposed of in the Supreme Court the total number of 32 cases. Twenty-two were affirmed,

eight were reversed, and two cases were abated or dismissed.

There have been 23 proceedings in equity passed on by the Supreme Court to condemn property on account of its being used in connection with making or transporting prohibited liquors. Of this number ten were affirmed and eight reversed. There were five cases appealed by the State of Alabama to the Supreme Court; two were affirmed and three were reversed.

In the Court of Appeals, there were disposed of 365 cases. Of this number 203 were affirmed and 110 reversed. Fifty-two were abated or dismissed.

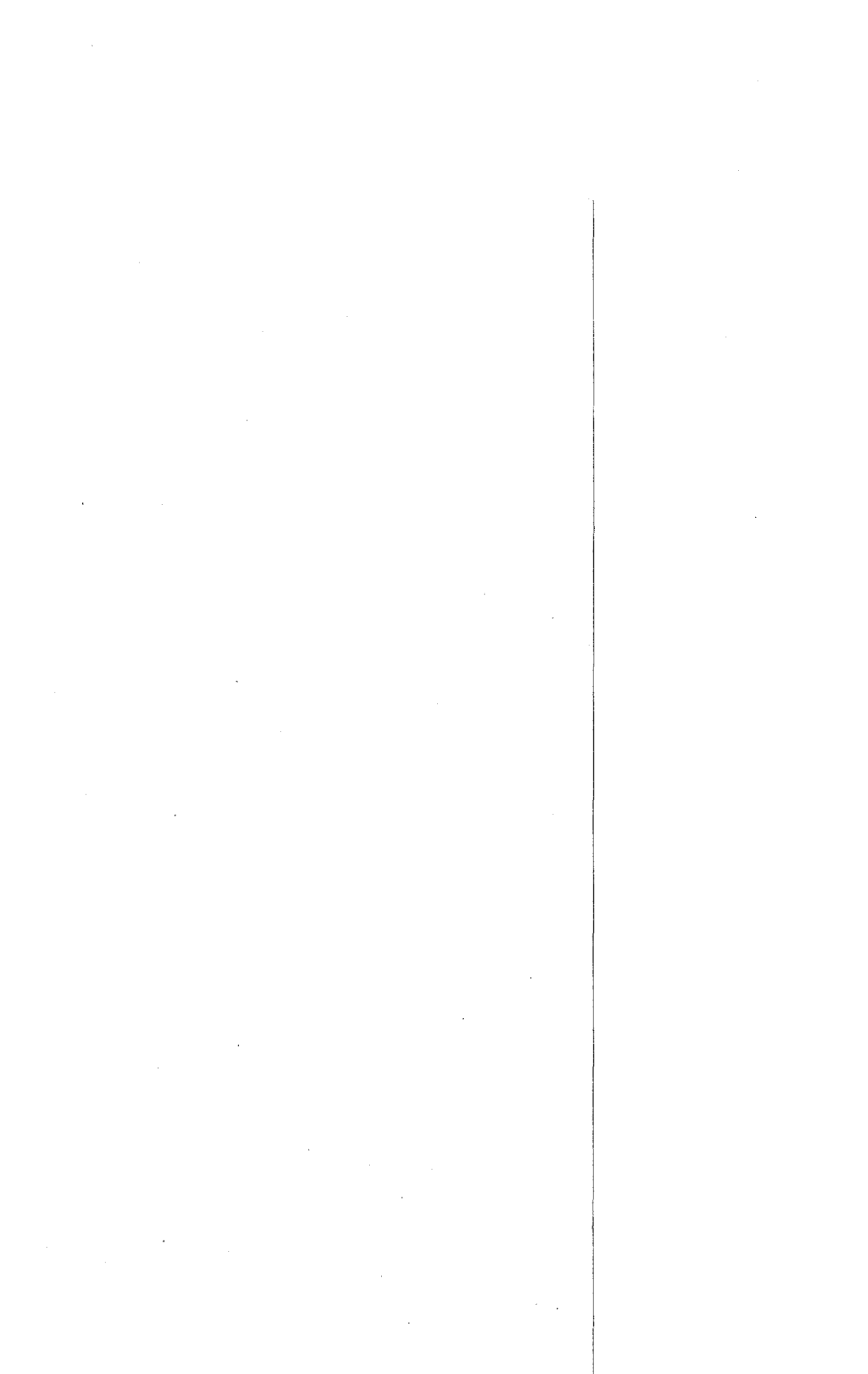
I wish to take this opportunity, in concluding this report, to thank your Excellency for the many courtesies shown me, and the splendid co-operation you have given me in the performance of my duties as Attorney General.

Respectfully,

J. Q. SMITH,
Attorney General of Alabama.

Montgomery, Alabama.

SPECIAL CASES
PENDING AND DISPOSED OF
FROM
OCTOBER 1st, 1918, TO SEPTEMBER 30th, 1920



CRIMINAL CASES

BALDWIN COUNTY LYNCHING PROSECUTIONS.

On the night of June 21, 1919, a mob composed of several persons overpowered the sheriff in the Baldwin County jail and killed Frank Foukal, a prisoner confined therein charged with murder. Immediately after the occurrence, an investigation was ordered, and it revealed that two mobs had been formed for the purpose of killing Foukal. The first mob, consisting of about eighteen men, started for the jail on Tuesday night, June 17th, but owing to a break-down of the automobiles in which they were being transported they failed in their mission. On the Saturday night following a second mob, consisting of ten men and two boys, accomplished its purpose.

A special term of the Baldwin County Circuit Court was called for the week of July 7th, a special grand jury empaneled, and indictments returned charging the following parties with murder: Sim Andrews, Louis Bishop, Walter Bishop, Harry Williams, John Johnson, Sam Williams, Dev-ereaux Nelson, George Nelson, and Albert Lipscomb. Indictments were returned charging a conspiracy to commit a crime against the following parties, who were in the Tuesday night mob: Joe Underwood, Harvey Underwood, Marsh Underwood, Charlie Nelson, Albert Nelson, Wesley Bishop, Henry Bishop, Henry Bishop, Jr., Jim Henderson, Harmon Pierce, Hudson Wright, Rudolph Pierce, Charles C. Bryant, Eddie Moore, and Ira Underwood.

Immediately after the indictments were returned, a special term of the court was held, and all of the parties above named were convicted, with the exception of Walter Bishop, who was adjudged insane and sent to the state institution for the insane at Tuscaloosa; Rudolph Pierce, who had a complete nervous break-down while confined in the Baldwin County jail, and was adjudged insane by the State authorities and likewise sent to the State institution at Tuscaloosa; Charles C. Bryant, Eddie Moore, and Ira Underwood, who were not convicted owing to insufficient evidence.

The net result of the prosecution was that penitentiary sentences aggregating twenty-five years were imposed; hard labor sentences aggregating twenty-six months were imposed; and fines amounting to more than \$5,200 were imposed on the various defendants. Some were convicted of murder, and some of conspiracy to participate in the crime.

The investigation in this case was begun on the 25th day of June, 1919, and the matter concluded by the special term of court on the 21st day of July, 1919. In less than one month's time all of the parties implicated in the two mobs had been apprehended and convicted, with the exception of the two who were adjudged insane and committed to the State institution for such persons at Tuscaloosa.

In addition to the apprehension and conviction of the parties implicated in the killing of Foukal, this office saw fit to call for the resignation of the sheriff of Baldwin County, Mr. Otis Richerson, who was in charge of the jail on that occasion, because of his negligence in failing to protect and guard the prisoner that was killed. He was given the option of resigning or having impeachment proceedings immediately instituted against him, and tendered his resignation to the Governor upon demand being made for same. This resignation was accepted, and a new sheriff appointed in his place.

The conduct of the Baldwin County matter and its results were the subject of favorable comment by the press in many sections of the country, and many compliments were bestowed upon the State for its vigorous and effective work in stamping out lynch law in this State. These cases were handled by Horace C. Wilkinson, Assistant Attorney General.

CALDWELL V. STATE OF ALABAMA.

Edgar L. Caldwell was convicted January 18, 1919, of the murder of Cecil Linton, a street car conductor, in An-niston, Alabama, December 15, 1918, defendant being at the time a soldier of the United States. He was sentenced to be hanged, but appealed to the Supreme Court of Alabama. The case was affirmed by the Supreme Court and an application for rehearing was overruled, and new

date set for the execution. Thereupon petition for habeas corpus was filed, November 22, 1919, in the United States District Court at Birmingham, against W. E. Parker, Sheriff of Calhoun County, seeking release of the prisoner on the ground that the state courts had no jurisdiction. The writ was denied by the District Court. Appeal was taken to the Supreme Court of the United States, where the case was argued and submitted March 4, 1920. Affirmance was entered by the United States Supreme Court on April 19, 1920, and Caldwell was executed on July 28, 1920.

CIVIL CASES

TELEPHONE RATE CASE.

In January, 1919, during the Federal control of telephone and telegraph lines, as a war measure, the Postmaster General of the United States promulgated a schedule of increased telephone rates, applicable to intra-state business, which he sought to put into force and effect in Alabama, without the consent of the Public Service Commission of this State.

The State resisted the increase in rates without the approval of the Public Service Commission, and made application to Hon. Leon McCord, judge of the Circuit Court of Montgomery County, for an injunction to restrain the increased rates provided in the schedule submitted by the Postmaster General from becoming effective until the courts could pass on the legality of his order.

At the time that this action was taken, similar proceedings were pending in numerous states throughout the Union, and much contrariety of opinion was manifested by the various courts that were called upon to pass on the question involved.

Judge McCord denied the injunction, and an appeal was perfected to the Supreme Court of Alabama. His decree was so framed, however, at the instance of this office, that the Telephone Company was required to issue coupons for the alleged excess which they sought to collect, and were required to execute a surety company bond insuring the payment of the same. This was imposed upon them as a condition to Judge McCord's over-ruling the State's application for an injunction. The Telephone Company declined to comply with the terms of his decree, and were enjoined from collecting any charge that was not approved by the Public Service Commission of the State, pending the litigation.

Shortly thereafter, several of the cases from other states came before the Supreme Court of the United States on ap-

peal, and as these cases involved the identical question involved in the case in the Alabama Supreme Court, the decision on that appeal was delayed awaiting a decision from the Supreme Court of the United States. A conference of the Attorneys General of the various states was held in the City of Washington, and the brief prepared by this office to be submitted on the appeal of the State in our own court was adopted at that conference and submitted to the Supreme Court of the United States, signed by the Attorneys General of thirty-eight states, in support of the position taken by the respective states.

The Supreme Court decided that the country being still at war with Germany, the Government had the right to take an unlimited control over telephone and telegraph companies, and the rates and charges to be exacted while same were under Government control. The result of that decision was that all pending litigation was dismissed, and the matter closed, as all parties were bound by the decision of the highest court in the land.

STATE V. BRADFORD AND HENDERSON.

This case was inaugurated during the previous administrations, being a suit against the bondsmen of S. A. Bradford, deceased, treasurer of public school funds for Marshall County, for defalcation amounting to approximately \$8,000. The case had gone to the Supreme Court on appeal from decree of Marshall County Circuit Court overruling demurrers, and the decree of the lower court had been affirmed. In April, 1919, testimony was taken in the case, but the death of one of the bondsmen delayed proceedings until the case could be revived against his executors. The executors appeared and filed answer to the original bill, and decree was rendered in favor of the State. In December, 1919, the Supreme Court affirmed the decree. Reference was waived, and an agreement reached, in March, 1920, for consent judgment. Judgment was rendered accordingly, on June 3, 1920, for \$7,413.28, which sum was paid over to the Department of Education on that date.

GRIMES V. ELIASBERG BROTHERS MERCANTILE COMPANY.

This and four other suits were filed to test the validity of the state income tax law passed by the 1919 legislature. Complaints were filed February 19, 1920, and the cases heard on general demurrer in the Circuit Court of Dallas County on March 19, 1920. Decrees were rendered against the State, which were affirmed by the Supreme Court in April, 1920. Application for rehearing was denied.

STATE V. REPUBLIC IRON & STEEL COMPANY.

This suit contested the validity of the coal and iron ore tonnage tax imposed by the 1919 legislature. Complaint was filed in December, 1919, and heard on demurrers in the Montgomery County Circuit Court on January 6, 1920, judgment being rendered for the State in the sum of \$3,043.12, which judgment was paid pending appeal. The decree was affirmed by the Supreme Court on June 5, 1920.

WOFFORD OIL COMPANY V. J. Q. SMITH, ATTORNEY GENERAL AND OTHERS.

The Wofford Oil Company, the Standard Oil Company, and the Texas Company, filed suits to test the gasoline inspection law of 1919. The first bill was filed by the Wofford Company, in the United States court, January 2, 1920, and a temporary restraining order issued. After a hearing at New Orleans January 17, 1920, before three Federal judges, on motion to dismiss and answer, an order was made granting interlocutory injunction, January 29, 1920. Appeal is now pending in the United States Supreme Court.

STATE V. MARYLAND CASUALTY COMPANY.

This suit had been initiated by a previous administration. It is a suit on the bond of the Casualty Company as surety for Thoele-Phillips Manufacturing Company, in connection with a contract for hire of state convicts. The State

filed a claim in the Bankruptcy Court for the amount due, and asked that the claim be allowed priority. At the same time complaint was filed in the Circuit Court of Montgomery County against the surety company. The claim was allowed as a general claim, in the amount of \$5049.75, but not as a prior claim, and petition for review, appeal, and petition to revise failed to overturn the order of the Referee. In the Circuit Court various pleadings were filed, including interrogatories to the State, and the case continued pending the proceedings in the Federal courts. Both proceedings were pending in January, 1919, when this administration took up the matter. In March the Circuit Court of Appeals decided against the State on the question of priority, leaving only the proceeding in the circuit court. The State filed a petition for writ of prohibition against the judge of the circuit court, to prevent his requiring the State to answer interrogatories, and the writ was granted by the Supreme Court, June 26, 1920 (83 South. 71), and application for rehearing was overruled in October, 1919. Tentative propositions of settlement were made from time to time, without success. In May, 1920, the circuit court ruled on the pleadings in favor of the State, and judgment for the State was entered in June. An appeal to the Supreme Court is now pending.

PARKE ET AL. V. BRADLEY ET AL.

Complaint was filed March 4, 1920, to test authority of State Health Officer and State Medical Association to handle funds, the defendants being the State Treasurer, the State Health Officer, and the Medical Association. Decree on demurrers in favor of the State was entered in the Circuit Court of Montgomery County, April 19, 1920. The complaint was amended and demurrers refiled, and thereupon new decree was made in favor of the State. Appeal was submitted and argued in the Supreme Court, on June 16, 1920, and the Supreme Court affirmed the decree of the lower court, on June 30, 1920.

FRANCHISE TAX APPEAL CASES.

A number of appeals were filed, at the request of the State Tax Commission, during the early part of January, 1919, immediately preceding the advent of this administration. These appeals were directed against corporations who were returning the amount of capital employed in the state on the basis of the ad valorem taxes paid by them, which resulted in paying tax on only sixty per cent of the actual capital employed. This office prosecuted certain cases where the amounts were sufficient to justify continuing them, dismissed others, and settled as many as possible. On account of the small amounts involved, and the difficulty of obtaining information, a number of cases remained open, and a few are still pending.

STATE V. JEFFERSON COUNTY AND STATE V. CITY OF BIRMINGHAM.

These two suits were filed to recover amounts deducted as commissions by the Probate Judge of Jefferson County from the State's share of automobile license funds. The question was whether the 2½% commission should be deducted from the total collections made, or whether the 40% to the city or county should first be paid in full. The complaints were filed October 7, 1919, answers filed, and decrees entered for defendants in the Circuit Court of Jefferson County in November, 1919. Appeal was submitted and argued in the Supreme Court in April, 1920. The Court of Appeals reversed the decrees of the lower court, and rendered judgment in favor of the State for the amounts sued for, with interest. A petition for writ of certiorari was filed in the Supreme Court, which was denied June 26, 1920.

STATE V. W. B. FOLMAR & SONS.

This matter was pending during previous administrations. It grew out of an appeal by W. B. Folmar & Sons from an assessment made by the County Board of Equali-

zation of Pike County. The bank did not assess any capital with which to do business before 1919, but claimed to be conducting business on the credit and financial ability of the individual members of the partnership. The case is still pending in the Circuit Court of Pike County, many efforts to agree on a settlement, or on an agreed statement of facts, having been unsuccessful. The books of the bank have been examined by the State Tax Commission and balance sheets made showing amount of capital invested, on which tax should be paid, and the case is ready for trial.

STATE V. ALABAMA LAND & MINERAL COMPANY.

Several suits have been brought to recover lands claimed by the State. The principal case of this character is that against the Alabama Land & Mineral Company, in which this office filed bill of complaint June 25 1919, and later filed an amendment asking for an injunction to prevent the cutting of timber on the lands. Witnesses have been examined on three occasions. The suit is still pending in the Circuit Court of Calhoun County.

PUBLIC SERVICE COMMISSION, ENFORCEMENT OF ORDERS.

At the request of the Public Service Commission, the Attorney General's office has taken action in several matters to enforce the compliance with orders of the Commission. In the case of Public Service Commission v. Louisville & Nashville Railroad Company and Western Union Telegraph Company, a citation of the Commission was issued May 1, 1920, directing that telegraph service be not discontinued to twenty-one towns named in the citation. The railroad company filed a formal answer challenging the jurisdiction of the Commission, and the Telegraph Company filed a brief to the same effect. On May 8th the Commission made an order requiring that service be restored to the twenty-one towns. The railroad company then filed a bill of complaint in the Circuit Court of Montgomery County, against the Commission, on June 24, 1920,

asking for an injunction restraining the Commission from enforcing its order of May 8th, and temporary restraining order issued. The Attorney General has filed motion to dissolve the injunction, also demurrer to the bill. The suit is now pending in the Montgomery County Circuit Court.

STATE V. ATLANTIC COAST LINE RAILROAD COMPANY.

This was an appeal to the Circuit Court of Montgomery County by the State from the findings of the Judge of Probate of said county fixing the amount for paying the franchise tax of the Atlantic Coast Line Railroad Company for the year 1916 at \$3,836,512, the amount given in the return filed by the company on Feb. 26, 1916. Appeals were also filed for the years 1917, 1918, and 1919, and continued pending the termination of litigation in the original case.

The matter first went to the Supreme Court on a petition by the company for a writ of prohibition, on account of alleged error in perfecting appeal from probate to circuit court. The writ was denied.

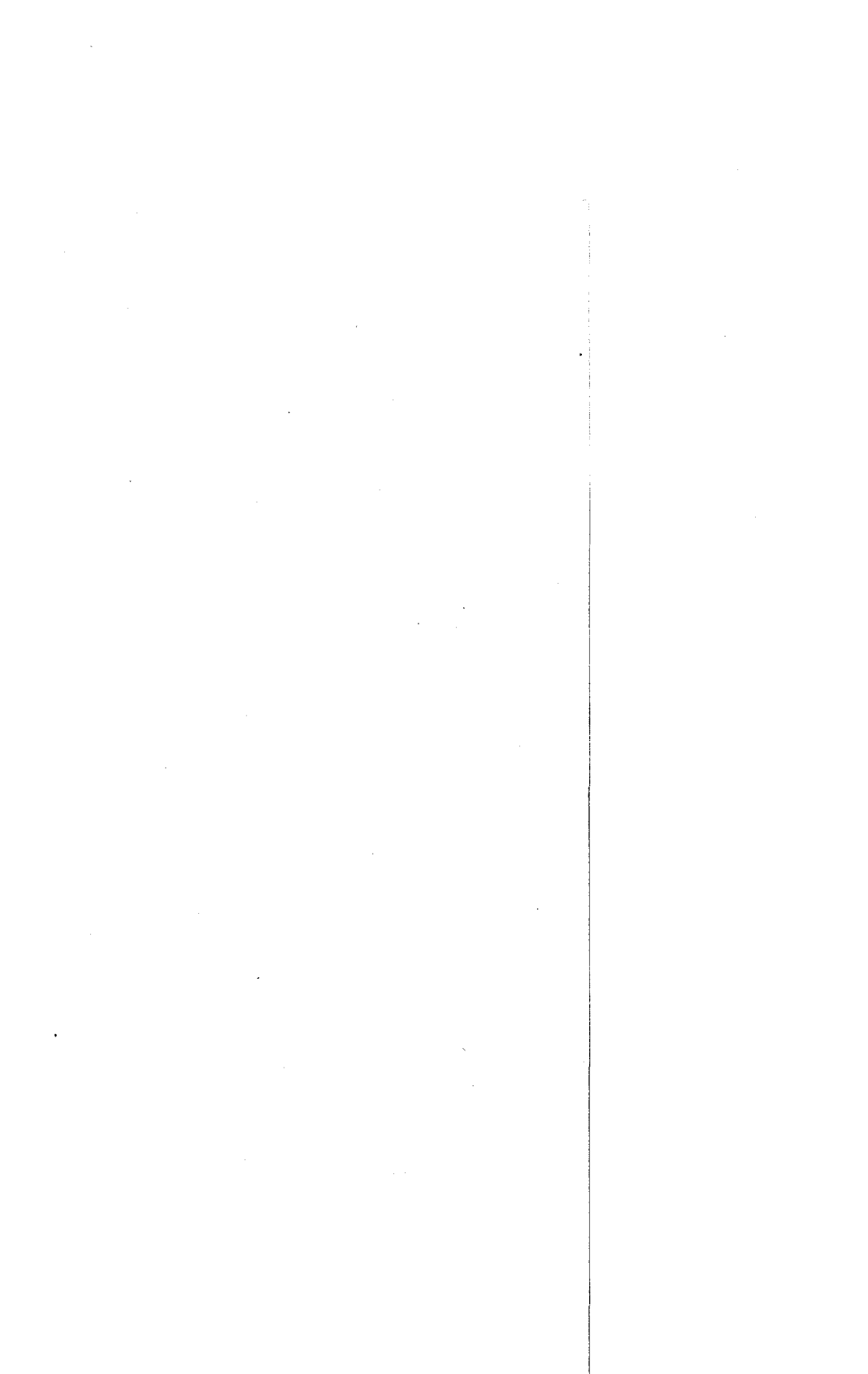
The State filed a lengthy complaint, with many exhibits, claiming the sum of \$25,967.72, with interest from Jan. 1, 1916. The complaint alleged that the company was a domestic corporation, having been made up of a number of smaller companies incorporated under the laws of various states, including Alabama; which Alabama corporations were not allowed to become consolidated or merged with corporations of other states except on condition that the corporation be and remain subject to the laws of Alabama as a domestic corporation. The defendant set up the act incorporating the Atlantic Coast Line Railroad Company in the State of Virginia, which act provided that the corporation should not by merger or consolidation lose its character of a Virginia corporation.

The Circuit Court sustained the defendant's demurrers to the complaint, and rendered judgment against the State. The State appealed, and the Supreme Court reversed the judgment, and rendered and remanded the cause. The defendant's application for rehearing was denied. (State v. A. C. L. R. Co., 81 South. 60.)

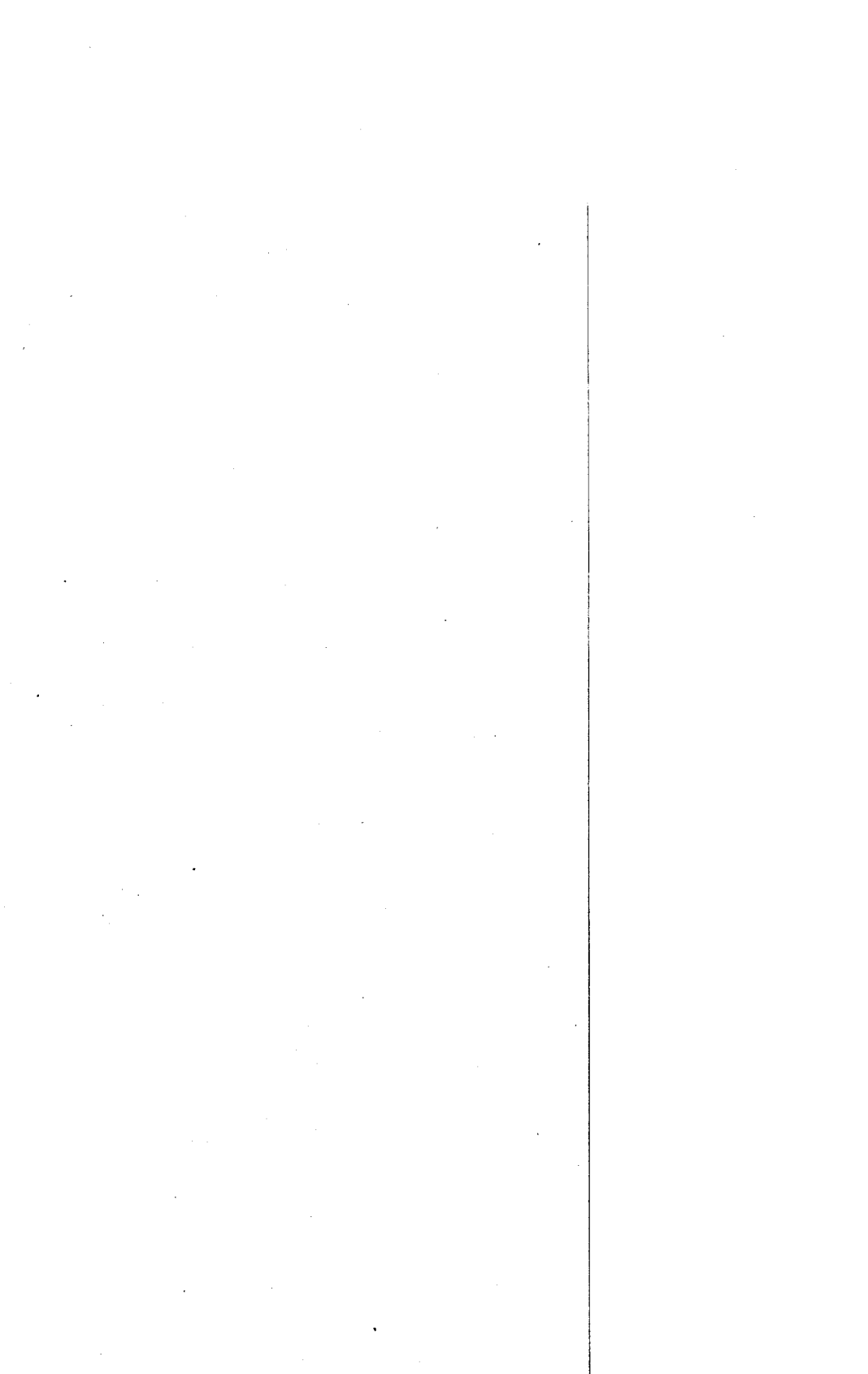
The Circuit Court then rendered judgment for the State in the sum of \$32,764.13. In August, 1919, the defendant again appealed to the Supreme Court, and the Supreme Court affirmed the case on Jan. 22, 1920. A new application for rehearing was also denied.

Defendant made petition to the United States Supreme Court for writ of certiorari, which was denied in May, 1920.

The company finally paid to the State, in July, 1920, franchise tax for the years 1916, 1917, 1918, and 1919, in the total sum of \$131,847.96. Settlement was also made by the railroad company with Montgomery County, in which county it had elected to make its returns.



OPINIONS
OF THE
ATTORNEY GENERAL
RELATING TO MATTERS OF PUBLIC INTEREST



OPINIONS OF THE ATTORNEY GENERAL

CHILD LABOR LAW:—Fourteen-year-old boy may not work in industrial plant on theory that such work is in nature of technical training.

October 1, 1918.

Dr. Glenn Andrews,
State Inspector of Child Labor,
Capitol.

Dear Sir:

May a fourteen year old boy be permitted to work in the Tennessee Coal, Iron and Railway Company's industrial plant, Birmingham, Ala., under the provisions of sections 5 and 6 of the Child Labor Act, (Acts, 1915, page 194) on the theory that such employment would be in the nature of technical training.

Answering the above it is my opinion that a strict construction of Sections 5 and 6 would not so permit. As to do so would be in the nature of a subterfuge, and would be permitting that to be done indirectly which the statute directly forbids.

Very respectfully,
F. LOYD TATE,
Attorney General.

DEPARTMENTAL EXPENSE:—Additional statistician may be employed in Department of Agriculture and Industries.

October 1, 1918.

Hon. J. A. Wade,
Commissioner of Agriculture and Industries,
Capitol.

Dear Sir:

Replying to your letter of the 30th ultimo, with reference to your power under the law to employ for sixty days a statistician to collect certain data for the revision and republication of the Alabama Handbook, and asking under

what section of the Code he shall be paid, I beg to advise you as follows:

Under subdivision 13 of section 22, it is your duty to prepare this handbook, and if it is necessary to employ this statistician—that is, if you cannot obtain the necessary statistics or information through the regular channels—then you are authorized to incur the expense under provisions of section 52. Section 73 would also cover this item, in so far as appropriation of funds is necessary.

Very truly yours,

F. LOYD TATE,
Attorney General.

SHERIFFS:—Allowance for feeding prisoners includes food and preparation thereof, but not purchase of utensils and crockery.

October 2, 1918.

Dr. Glenn Andrews,
State Prison Inspector,
Capitol.

Dear Sir:

Your request for opinion, of date September 23, 1918, asking what is implied by the term "Sheriffs shall receive for feeding prisoners in jail," and asking if this term applies merely to the food given, or does it embrace the preparation of the food, as well as the utensils in which the food is cooked and served, the kitchen range and the fuel, is received.

It is my opinion that all equipment necessary for the preparation of the food such as cooking utensils as well as crockery or dishes for serving the food to the prisoners, should be furnished by, and is a proper charge against, the county. The actual expense of preparing food, which of course will include service of a cook, should be furnished by the sheriff himself. The jail itself, and the necessary bedding are furnished by the county, and it is my opinion that the range and cooking utensils and dishes for serving are just as essential as the bedding, and are therefore proper charges to the county as stated. To answer in another form, it might be stated thus. That it is the sheriff's duty under the law, to furnish the food and its preparation, but

all the mechanical means necessary for preparing and serving it, would be furnished by the county.

Yours very truly,
F. LOYD TATE,
Attorney General.

INSURANCE COMPANIES:—Are liable for payment of franchise tax to county.

October 7, 1918.

Hon. C. B. Smith,
Commissioner of Insurance,
State Capitol.

Dear Sir:

I have your letter of the 5th instant, enclosing letter to you of the Stonewall Insurance Company of Mobile, Alabama, and requesting an opinion as to whether or not the said Insurance Company is liable to the county of Mobile for the tax enumerated in said letter.

From the letter of the Company I note that it pays a corporation franchise tax of \$90.00, sixty dollars for the use of the State, and thirty dollars for the use of the county, and that it also pays the one hundred dollars filing fee required of insurance companies, and asks if the payment of this filing fee relieves it from the payment of the franchise tax of \$30.00 to the county.

By section 16 of the act providing for taxation on corporations (Acts 1915, page 397 et seq.) a franchise tax is provided to be paid to the State by all corporations. By subdivision 6 of section 16, it is provided as follows:

“The payment of the franchise tax required by this article shall not exempt any corporation paying the same from the payment of the regular license or privilege tax specified or required for engaging in or carrying on any business for the engaging in or carrying on of which a license is required of individuals, firms, or corporations.”

By subdivision 7 of said section 16, it is further provided that the county may levy a franchise tax not exceeding 50 per cent. of the amount of the franchise tax for the

State. It will thus be seen that section 16 provides for a franchise tax to be paid to both the State and county by all corporations and specifically provides that the payment of the franchise tax shall not exempt the corporation from the payment of the regular license or privilege tax.

The legislature of 1915 further provided for a license or privilege tax to be paid by persons, firms, corporations, and associations. (See Acts 1915, page 490 et seq.)

By subdivision 59 of the said act (Acts 1915, p. 505) it is provided that all insurance companies shall pay a filing fee of \$100 which is a part of the license or privilege tax. The last sentence in subdivision 59 reads as follows:

"No license or privilege tax shall be charged any insurance company by any county."

It will thus be seen that this provision only applies to the charging of a "license or privilege tax" by a county and has no reference to the franchise tax. I am therefore of the opinion, and so advise you that the Stonewall Insurance Company is liable for the payment of the franchise tax levied against it by the county of Mobile. I herewith return the letters of the Stonewall Insurance Company to you.

Respectfully,
F. LOYD TATE,
Attorney General.

ACCOUNTING:—State Auditor should handle special fund of Inter-departmental Social Hygiene Board.

October 11, 1918.

Hon. M. C. Allgood,
State Auditor,
Capitol.

Dear Sir:

I am in receipt of your letter of even date, in which you ask if you are authorized to receive \$23,247.15 from the Interdepartmental Social Hygiene Board to be paid out on State warrants by the State Treasurer upon approval by Alabama State Board of Health. I have also noted the enclosure attached, being a letter from Hon. C. C. Pierce,

Acting Secretary of the I. S. H. B., transmitting this amount of money, and showing the receipt thereof by the State Treasurer, receipt in triplicate by Hon. W. L. Lancaster, State Treasurer, for this sum, and a circular letter by Mr. Pierce to State Treasurers and Boards of Health with reference to the use of, and accounting for, this fund.

In reply to your inquiry, I beg to advise you that under section 599 of the Code, subdivision 3, it is your duty as State Auditor to keep the accounts in relation to * * and every other special or trust fund in which the State is interested, the keeping of which is not specifically intrusted to other officers. The first subdivision of this section makes you the superintendent of the State fiscal affairs, and I deem it entirely proper and right, and in fact, your duty to handle this as a special fund under the law I have above pointed out. It is my opinion that it should be kept separate from any other funds, and used solely and exclusively for the purposes mentioned in the enclosures. In other words, you should not draw warrants until they are drawn by the Board of Health in the manner indicated, and should otherwise conform to the suggested methods of accounting. At the same time you are at liberty to use any methods you see fit as to accounting in behalf of the State.

If there is anything further, or if I have not answered you specifically enough, advise me.

Yours very truly,

F. LOYD TATE,
Attorney General.

MUNICIPAL GOVERNMENT:—Change at Hartselle from commission to aldermanic form of government necessitates appointment of aldermen from city at large.

October 16, 1918.

Hon. Chas. Henderson,
Governor,
Capitol.

Dear Sir:

Referring to the matter of the change at Hartselle from commission form to aldermanic form of government, the question has been propounded to me whether or not it

would be necessary that the aldermen in a city of less than six thousand (6000) population be appointed from particular wards in the city, or whether under such circumstances the aldermen may be appointed generally from the city at large.

Under provisions of section 2, of an act approved August 25, 1909, page 197, 198, it is provided:

"In cities having a population of less than six thousand, and in towns, the legislative functions shall be exercised by the mayor and five aldermen, the mayor shall vote with and preside over the deliberations of the council, and the aldermen in such municipalities shall be elected by the city or town at large at the first general election, on the third Monday in September, 1908, and biennially thereafter, they shall be elected by the city or town at large, or from wards, as the said councils may determine not less than six months before an election."

From the foregoing it appears that aldermen in such a contingency may be elected or appointed either from the city at large or from the wards. I am informed that the town of Hartselle is not divided into wards, and, therefore, it would be necessary to appoint aldermen from the town at large.

Very truly yours,
F. LOYD TATE,
Attorney General.

SCHOOL DISTRICTS:—Attempted change in boundaries.

October 11, 1918.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

I am in receipt of your letter of even date enclosing certified copies with reference to proposed change of district boundaries in a certain district in Crenshaw County, and note your statement of facts with reference to the matter. You ask:

"Assuming that the facts are as represented to me by Dr. H. A. Donovan and Mr. G. W. Slaughter, residents of District No. 20, please advise whether in your opinion the application and notice of change of district conform to law and whether in reality any change was made legally as a result of said application and purported action of the Crenshaw County Board of Education."

In reply thereto, I beg to state to you that said application and notice do not conform to law, and, inasmuch as the law with respect to the changing of district boundary lines (sec. 1691, Code) has not been complied with in other particulars, it is my opinion that the original district still exists, and that the attempted change never became effective. You will notice in sec. 1691, it is provided that:

"Whenever the boundaries of any public school district are changed by the county board of education or a new public school district shall be created by said board under this section, the county superintendent of education, within ten days after such change, or the creation of such district, shall file in the office of the judge of probate of his county, an accurate description of such change, or of the district so created, and the judge of probate shall record the same in the book to be kept by him. The change of the lines or boundaries of any public school district or the creation of a new district under this section may also be made by adding to or taking from any district composed of an incorporated city or town such contiguous territory as such board may deem best."

Under the statement of facts presented by you not only did the parties fail to have the probate judge make the proper record, but the notice shows on its face that not merely a division of district No. 15 was contemplated, but, following out description contained therein, other districts which are not mentioned, were involved. The order issued by the county school board does not connect with the notice given at all in its reference to an advertisement in the Crenshaw County News.

The order attempting, as shown by the papers attached, to change the district is so loosely drawn, and comes so far short of the law, that it is my opinion it is of no effect what-

ever, and as stated above, District No. 20 remains exactly as it was before the attempted change.

Very truly yours,

F. LOYD TATE,
Attorney General.

COUNTY EXPENSES:—The county should supply a typewriter for the use of the Circuit Clerk.

October 23, 1918.

Hon. A. H. Moody, Judge of Probate,
Jackson County,
Scottsboro, Ala.

Dear Sir:

I find yours of Oct. 22, 1918, requesting opinion as to whether or not payment for a typewriter for use in making transcripts by the clerk of the circuit court, would be a proper charge against the county, and beg to advise you as follows:

Subsection 15 of section 3272, Code, 1907, makes it the duty of the circuit clerk to make out transcripts as required by law in all cases of appeal to the Supreme Court. Rule 26 (Supreme Court Rules), provides: "The matter of all appeals to this court and all applications for any original process or action shall be plainly *typewritten* or printed." This, therefore, makes it the duty of the circuit clerk to use a typewriter in preparing appealed cases for the Appellate and Supreme courts of this State.

Sec. 3278 of the Code provides that the court of county commissioners must allow to the circuit clerk the amounts properly expended by him for books and stationery for use in his office. The term "stationery" has been frequently construed by the courts of the land to include typewriters. This construction of the word "stationery" is borne out by an opinion of the Hon. Robert C. Brickell, former Attorney General of Alabama, in which opinion I concur, and a copy of which is inclosed you herewith.

It is my opinion that a typewriter purchased by the circuit clerk and used for the purposes mentioned in your inquiry would be a proper charge against the county.

Yours very truly,

F. LOYD TATE,
Attorney General.

BANKS:—Trust companies not doing a banking business are not under the supervision of the State Banking Department.

October 24, 1918.

Hon. D. F. Green,
Supt. of Banks,
Capitol.

Dear Sir:

I have your letter of the 23d instant, calling my attention to section 3528 of the Code of 1907, and asking opinion as to the following:

“1. Are trust companies, doing business in Alabama, that are not doing a banking business, under my supervision, and should I have my Examiners examine the same?

“2. If they are under my supervision, are they subject to the fees required to be paid by Section 5 of the Act amending the banking law, approved Feb. 15th, 1915?”

In reply thereto, I beg to state that section 3528 of the Code of 1907 reads as follows:

“All corporations organized and operating as trust companies shall have the word “trust” as part of their corporate names, shall be amenable to the general banking laws of the state in so far as said laws are applicable to trust companies and not in conflict with the provisions of this article, and shall be examined by the state bank examiner as state banks are examined.”

The act creating the banking department was approved on March 2, 1911. (See Acts 1911, p. 50 et seq.) This act was later amended by the act approved February 15, 1915, (See Acts 1915, pp. 89 et seq.) In these two acts creating the banking department, it will be noted that the language used is as follows:

“There is hereby created a banking department of the State of Alabama charged with the execution of all laws relating to corporations and individuals doing or carrying on a banking business in the State of Alabama.”

By section 7 of the act of 1911, (See Acts 1911, p. 56), it is provided:

"Every bank carrying on a banking business in the State other than national banks shall be subject to the supervision and inspection of the superintendent of banks and the regulations and supervision hereof."

By section 6 of the act as amended, (Acts 1915, p. 92) it is provided:

"Each bank carrying on a banking business in the State of Alabama shall, on the call of the superintendent, annually pay into the treasury of the State between the first day of January and the first day of April of each year, to be used as an aid in defraying the expenses of the banking department of the State," in certain amounts according to amount of capital stock.

It will be noted that section 3528 was in the Code prior to the adoption of the act creating the banking department. It will further be noted that in the act creating the banking department and defining its powers, nothing is said about trust companies, and the powers of the banking department are limited to "persons, doing or carrying on a banking business."

I am, therefore, of the opinion and so advise you, first, that trust corporations, doing business in Alabama, but not doing a banking business, are not under the supervision of the banking department, and you are not called upon to have your examiners examine same. Second, Such trust companies, not being under the supervision of the banking department, are not subject to pay the fees required by section 6 of the banking law as amended by the act of 1915.

Very truly yours,

F. LOYD TATE,
Attorney General.

DOG TAX:—Application of funds derived from dog tax, and disposition of surplus, under act of 1915.

October 24, 1918.

Hon. W. W. Lavender,
Centreville, Ala.

Dear Sir:

Replying to yours of the 23d instant, as to when the surplus accruing from the dog tax fund should be paid to the proper authorities for use of the public schools, etc., I beg to advise that section 3, Acts 1915, page 600 provides that claims against the dog tax fund shall be filed with the county treasurer or custodian of the county funds, who shall, after the first of March of each year, draw his warrant in favor of the claimant for amount allowed by the court of county commissioners or board of revenue. The act further provides that if there is any surplus after paying for the killing or injuring of animals, etc., it shall be used in the payment of the travelling expenses, etc., for attendance in the Pasteur Institute, Montgomery, Alabama, by any one who has been bitten by a mad dog, and who is unable to pay these expenses. Any surplus remaining after paying all of such claims as mentioned above, shall be transferred, one-half to the credit of the State of Alabama, to be deposited in the State treasury, and the remaining half of said surplus so remaining, to the credit of the county for the public school fund.

It will be seen from the above provisions that the custodian of the county funds will be required to hold all moneys received in any year under the dog tax law, until the first day of March of each succeeding year, after which date he pays such claims as may have been filed and allowed, and the surplus remaining being distributed as provided for under said section, and as referred to above.

My construction of the act is, therefore, and it is my opinion that any surplus accruing to the public school funds could not be paid over to the proper authorities until *after the first day of March.*

Yours very truly,

F. LOYD TATE,
Attorney General.

DEPARTMENTAL EXPENSE:—Fee of attorney employed by the Governor may be paid from the Governor's contingent fund.

October 26, 1918.

Hon. M. C. Allgood,
State Auditor.
Capitol.

Dear Sir:

I beg to acknowledge receipt of your request of October 25, 1918, for an opinion as to whether or not a requisition of date October 25, 1918, made by Judge W. H. Samford in the sum of two thousand dollars (\$2000.00) for certain contingent services performed by him for the Governor during the year 1915, said requisition bearing the approval of the Governor, of date October 25, 1918, and directing that said sum be paid out of the Governor's contingent fund for the year 1918, is a legal charge against said fund for the year 1918—said request containing as an enclosure the requisition in question.

Replying thereto I beg to advise you as follows:

In the case of Allgood, Auditor, v. Stallings et al., which was a suit by mandamus proceedings against the State Auditor to compel the payment of Attorney's fees for special services performed under employment by the Governor under section 2241 of the Code, out of a special annual appropriation to the State Tax Commission under section 2222 of the Code—section reading as follows:

"The entire appropriation for the Commission, together with every item of the expense allowed therefor, shall not exceed in any one year the total sum of twenty-five thousand dollars, which sum, or as much thereof as may be necessary, is hereby appropriated annually."

The Court, McClellan, J., in passing upon the legality of this claim said:

"While the authority to incur expenses during each fiscal year was limited to the sum named in the statute (sec. 2222), the actual payment of these expenses, the issuance of warrants, was not restricted by the statute to the fiscal year in which the service was rendered or

the expense incurred; though, as stated, the payment could not be made unless there was an unexpended balance in the appropriation for the fiscal year during which the expense was incurred. (*Allgood v. Stallings* 197 Ala. p. 123.)

This brings us to an analysis of the law providing for the Governor's contingent fund, and a comparison of same with section 2222 of Code above quoted, for the purpose of ascertaining their analogy or difference, if any, applying the reasoning as set forth in *Allgood v. Stalling* (*supra*).

The statute providing for the Governor's contingent fund is found, as amended, in Acts 1909, pages 236-7, and so much thereof as is applicable here reads as follows:

"Section 1. Be it enacted by the Legislature of Alabama, that section 572 of the Code of Alabama be and the same is hereby amended so as to read as follows: 572, Contingent Fund. There is hereby appropriated for the fiscal year of 1909-1910 the sum of twenty thousand dollars and annually thereafter the sum of ten thousand dollars for the contingent expenses of the executive department, to be paid out of the treasury on the warrant of the State auditor under the direction of the Governor; provided, that any part of such annual appropriation may in the discretion of the Governor be used for the better enforcement of the laws of Alabama, etc."

It will be noted that there is no limitation upon the Governor as to the amount of expense he may legally incur under this section, as is the case under section 2222. The account itself states, among other services, that a part of the service was "for the better enforcement of the laws of Alabama." Certainly there can be no question as to the legality of the claim under the Governor's contingent fund—and in view of the fact that the Governor's contingent fund is not expressly limited as to the extent of the expense that may be legally incurred thereunder, and is limited only as to the amount of the annual appropriation, it is my opinion that in the event there is no unexpended balance to the Governor's contingent fund for the year 1915, to cover the requisition in question, it may be legally paid from any un-

expended balance to the credit of said fund for the year 1918. This construction is borne out by the wording of the act itself; by the custom maintaining through former administrations; and it would clearly be against public policy to hold otherwise, for a contingency might well arise in any year, requiring the services of an expert to meet it, yet the Chief Executive would be powerless to provide for the emergency and protect the interests of the State, in the event the contingent fund for that particular year should have already been exhausted.

It may even be said that whenever it is ascertained that the claim is for the necessary contingent expenses of the State, the language of the statute makes the Governor's findings in the premises final.

It is my opinion that the requisition may be legally honored by the issuance of a warrant upon the Governor's contingent fund for the present year. The requisition is returned to you herewith.

Respectfully,
F. LOYD TATE,
Attorney General.

CHILD LABOR LAW:—Field of operation of sections 1 and 13 of Child Labor Law of 1915; no conflict as to newsboys.

October 29, 1918.

Dr. Glenn Andrews,
State Prison Inspector,
Capitol.

Dear Doctor:

I have before me yours of the 25th instant, in which you state that you are in doubt as to the enforcement of certain provisions of the Child Labor Law, (Acts 1915, pp. 193-200) suggesting a conflict between sections 1 and 13 of the act in question, and asking me to interpret the said act in this particular.

In reply I beg to state that in my opinion, section 13 is really a further exception to the provisions of section 1 than is noted in section 1 itself. Section 1 provides:

"That on and after * * Sept. 1, 1916, no child under fourteen years of age shall be employed, permit-

ted or suffered to work in any gainful occupation, except agriculture or domestic service; provided, however, that boys *twelve* years of age and over may be employed in business offices and mercantile establishments in cities or towns under 25,000 population, according to the latest Federal census, during such time as the public schools in the city or town in which the child resides are not in session."

So that, the first and general provision of the law is, that no child under 14 years of age shall be employed, except in agriculture and domestic service, and except boys 12 and over in towns of less than 25,000 when school is not in session. Now, the "newsboy section" 13, is a further exception to the general law, and permits boys over twelve years of age, and girls over 18, in cities of 25,000 population or more to sell newspapers, &c, in any street or public place; and permits boys ten years of age and over to carry newspapers and periodicals on fixed routes in the resident districts of such cities until 8:00 p. m. and after 5:00 a. m., provided he complies with the requirements of the act as to wearing a badge and attending school. You will note that this exception made by section 13 does not permit these children under fourteen years of age to engage in anything other than the things specifically mentioned in the section, and it is evidently intended to cover the matter of the sale of newspapers and periodicals, although it does not say that boys and girls under the ages stated shall not be employed or permitted or suffered to work in any other trade or occupation performed in any street or *public place*. The evident purpose of this section is to make an exception, as stated, with reference to newsboys as against the provisions of the act in section 1, and possibly others. There could not be given to this section any field of operation by any other construction.

Now, with regard to the words "public place" as used in section 13, I think a different meaning would obtain here than in connection with some of our other statutes. The term public as applied to a place is not an absolute, but a relative term, and is used in contradistinction to the word *private*. It is relative, and here it must be construed in connection with the section under consideration. (See 6 Words & Phrases, 5806). Here it would mean not only

streets and alleys, but drink stands, theatres, lobbies, hotels, restaurants, and such places as newsboys in plying their work would probably visit. I do not think "public place" as used in section 13, has any other or further meaning than as applied to the newsboy work contemplated by the section.

In short, my interpretation of the 13th section of the act is that it is an exception to such sections as might otherwise conflict with it, in favor of newsboys and girls, and is an attempt to make the exception subject to certain regulations and provisions governing those excepted from the general operation of the act. So construing it, a field of operation is given to both sections 1 and 13, and the meaning is made plain.

I think you are quite right in concluding that the act fixes definitely the minimum age for children in mills at fourteen years, and I do not think that "public place" as it occurs in section 13 would have any application to mills, and I do not think you should permit children under 14 to work in mills. In other words, I don't think section 13 has any bearing whatever on the sections covering mills and factories.

If I have not made myself plain to you, or if there is anything further you desire on the subject, I shall be glad to undertake to go further into the matter.

Yours very truly,

F. LOYD TATE,

Attorney General.

TAXATION:—Nothing in the Alabama Constitution prohibits the levying of an income tax.

October 29, 1918.

Hon. T. W. Sims,
Chairman, State Board of Equalization,
Capitol.

Dear Sir:

I have your letter of the 26th instant, in which you request opinion as to whether an income tax would be permissible under the constitution of the State of Alabama, if the legislature would see fit to enact statutes providing for

same. In reply thereto, I beg to state that it is my opinion, and I so advise you, that there is nothing in the constitution of Alabama which prohibits the levying of an income tax. The only section in the constitution bearing upon this matter at all, is section 211, which I here quote:

“All taxes levied on property in this state shall be assessed in exact proportion to the value of such property but no tax shall be assessed upon any debt for rent or hire of real or personal property, while owned by the landlord or hirer during the current year of such rental or hire, if such real or personal property be assessed at its full value.”

If the income tax is provided for with the exception named in section 211, it would, in my opinion, be valid.

Very truly yours,

F. LOYD TATE,
Attorney General.

DEPARTMENTAL EXPENSE:—Appropriations may be made out of the general fund “sufficient to carry out the provisions” of an act.

October 29, 1918.

Hon. T. W. Sims,
Chairman State Board of Equalization,
Capitol.

Dear Sir:

I have your letter of the 26th instant, which reads as follows:

“Under the Arizona statutes with reference to the State Tax Board, we find the following: ‘There is hereby annually appropriated out of the general fund of the State Treasury a sum sufficient to carry out the provisions of this act.’ We respectfully request your opinion as to whether such a provision, if enacted by our legislature, would in any way violate the terms of our constitution.”

In reply thereto, I beg to state that the act commonly known as the Attorney General’s bill, enacted by the leg-

islature of 1915 (Acts 1915, page 719 et seq) providing for employment of special assistants to the Attorney General, and for other expenses to be incurred by the Attorney General, makes the following appropriation.

"There is hereby appropriated out of the State Treasury a sum of money sufficient to meet expenses incurred under the provisions of this act."

It will be noted that the appropriation under the act cited above is almost identical with the appropriation in the statute. This section 8 was under review in the case of the State ex rel, Turner v. Henderson, Governor, page 344, 74 So., and in that case the Supreme Court of Alabama, through an opinion rendered by Justice Sayre, held that the appropriation was sufficient to conform to section 72 of the Constitution of Alabama, 1901.

I am of the opinion, and, therefore, advise you that an appropriation in the language of section 8 quoted above, would be in compliance with our State Constitution.

Very truly yours,

F. LOYD TATE,
Attorney General.

SHERIFFS:—Sheriff is entitled to deduct five per cent commission on moneys collected under execution only when such moneys go to the county.

October 31, 1918.

Hon. J. M. Hamlin,
Sheriff, Clay County,
Ashland, Alabama.

Dear Sir:

I am in receipt of your letter of the 29th, asking whether you are entitled to a five per cent commission on fines, solicitors' fees, and court costs collected by you under execution in the county and circuit courts. The only provision of law on this subject is that contained in subdivision 3 of section 5870, Code 1907, wherein it is provided that of the moneys received by the sheriff *for the county*, he may deduct 5% for his compensation. The solicitors' fees that go to the state, and court costs, would not be subject to

this 5% commission, the costs being the fees, &c., of officers of court, witnesses, et cetera, and not county's funds. It is only such money as you receive *for the county*, that you are entitled to the 5% commission on.

Statutes giving costs and fees must be strictly construed and not extended beyond their letter. The sheriff may have, at times, to perform services without compensation. *Hawkins v. State*, 124 Ala. 102; 27 So. 215. A sheriff or constable claiming fees or costs is bound to point to a definite law authorizing it. *N. A. R. Co. v. Lowery*, 3 Ala. App. 511, 57 So. 260; and many other cases to the same effect.

Yours very truly,
F. LOYD TATE,
Attorney General.

WAREHOUSES:—A Federal licensed warehouse must make bond to the State of Alabama in the sum of \$5,000.00.

November 6, 1918.

State Board of Equalization,
State Capitol,
City.

Gentlemen:

Your request of even date for an opinion on the proposition submitted by Judge Hammett of the Probate Court of Talladega county, I beg to advise you as follows:

A Federal licensed cotton warehouse would, in my opinion, be required to file a bond, payable to the State of Alabama, in the sum of five thousand (\$5,000) dollars, under Section 6128, of the Code.

Under the provisions of Section 6 (Act of August 11, 1916, c. 313, U. S. Compiled Statutes Annotated, vol. 8), it is made a condition to the granting of the Federal licenses, among others, that the warehouseman give bond "to secure the faithful performance of his obligations as a warehouseman under the laws of the State * * * in which he is conducting such warehouse," etc.

It will thus be seen that it is apparently one of the conditions of granting him a license to comply with all of the laws of this State, and the Federal license might be revoked for his failure to make the bond required by our State.

I am returning Judge Hammett's letter of the 5th herewith.

Yours very truly,
F. LOYD TATE,
Attorney General.

OFFICE HOLDERS:—Temporary removal from the State does not, but acceptance of a commission in the Army does, vacate the office of member of County Board of Education.

November 14, 1918.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir: .

I acknowledge your request for an opinion on the following state of facts, and your query as to whether or not a vacancy now exists as member of the County Board of Education of Franklin County, on account of the absence of member Hon. Foy Guin, now a commissioned officer in the U. S. Army in France.

I understand the facts to be that Mr. Foy Guin, a member of the County Board of Education of Franklin County, Alabama, has been for several months absent from his county, and is, as a matter of fact, at this time a commissioned officer in the United States Army, on duty in France; that he has not resigned, that the County Board has not declared a vacancy, and that no one has been appointed in his stead on said board. You want to know whether such an absence of Mr. Guin amounts to an abandonment, or vacation, of his office; and if so, how his successor should be appointed.

Under the common law of our land, it has been held, that the temporary removal of a county officer into another county, though for the purpose of engaging in business therein, is not ground for removal, but, if the removal of the incumbent from the county is intended to be permanent, or for an unreasonable time, the office is vacated. (23 A. & E. Ency. 2nd Ed. p. 446, and authorities). Where an officer accepts an incompatible office, this is a vacation of the first. (Id. p. 427.)

It is, of course, impossible for Mr. Guin to attend to the duties of the county office, and, in my opinion, by the acceptance of the commission in the army, he has vacated the office of member of the County Board.

If the county board fails to appoint his successor for thirty days, the State Superintendent should appoint a successor. (See section 6 of the Act of 1915, Pamph. Acts, p. 22.)

I trust this is a full answer to your inquiry, but, if not, I will go further into the matter.

Yours very truly,

F. LOYD TATE,
Attorney General.

DEPARTMENTAL EXPENSE:—Making of contracts for purchase of coal.

November 19, 1918.

Hon. Charles Henderson, Governor,
State Capitol,
City.

Dear Sir:

In reply to your request for an opinion as to whether a valid contract can be made for the purchase of coal for the Legislature and other Departments of government during the present emergency, I beg to advise as follows:

Section 69 of the Constitution of Alabama of 1901 provides:

“All stationery, printing, paper, and fuel used in the Legislative and other Departments of government shall be furnished * * * * * under contract, to be given the lowest responsible bidder below a maximum price, and under such regulations as shall be prescribed by law.”

By Section 578 of the Code of 1907, it is provided:

“The Secretary of State is charged with the duty of making and executing contracts, with the approval of the Governor, the Auditor, and the Treasurer, required by Section 69, of Article 4, of the Constitution, as follows:”

It is then provided by said section that the Secretary of State shall fix a maximum price for the purchase of fuel and other things, that he shall advertise for bids for the length of time which such advertisement shall run, for the opening of the bids, for the contract to be let to the lowest bidder with the approval of the Governor, Auditor, and Treasurer; that the contractor shall furnish a bond for the faithful performance of the contract, to be approved by the Governor, Auditor, and Treasurer. By Subdivision 8 of Section 578 it is provided:

"The secretary of state must pass upon the compliance of any contract made in pursuance of this section; if he shall find the same to conform in every respect to the terms and stipulations of the contract, he shall certify the same, together with the amount due thereon, to the auditor, who shall draw his warrant on the treasurer, in favor of the party entitled thereto, for the amount so certified by the secretary of state."

It is a matter of common knowledge that under the present existing emergency the Federal Government has taken over the control of coal, which is one item of fuel that has to be used by the State, and that the Federal Government will retain control of the handling of coal during such period as it may deem necessary.

It is also a matter of common knowledge that the Legislature of this State will convene again in January, and that it will be necessary for coal to be furnished for the use of the Legislature and the other Departments of the State Government, and that without such the said Legislature and other Departments of the State Government would have to be closed.

The object of the provisions of Section 69 of the Constitution, and of Section 578 of the Code of Alabama, is that the contract for the furnishing of coal shall be let to the lowest bidder.

With the Federal Government controlling the price of coal, and regulating the price at which it shall be sold, no contractor could safely say at what amount he could furnish coal for a specific length of time, because the Federal Government might change the price. Again, when the

Federal Government fixes the price of coal, then the minimum at which it could be furnished, as well as the maximum, is named.

Section 69 of the Constitution, as well as Section 578 of the Code, were enacted to meet normal conditions, and at the time of their enactment such abnormal conditions as exist under the present emergency were not contemplated. In my opinion a substantial compliance with the provisions of said section of the Constitution, and said section of the Code, under the existing conditions, is all that is required. Otherwise, as stated above, the Legislative and other Departments of State would have to be closed, as it is a matter of common knowledge that fuel is necessary to enable them to operate in their respective functions.

I am therefore of the opinion, and so advise you, that a contract executed by the Secretary of State, and approved by the Governor, Auditor, and Treasurer, when accompanied by a bond of the contractor, as provided by section 578 of the Code of 1907, which stipulates that coal shall be furnished to the State at the price fixed by the Federal Government during the period when the Federal Government is exercising the control of the price of coal, would be a valid contract, and when complied with by the contractor would entitle him to the certificate from the Secretary of State to the Auditor for payment, as provided by Subdivision 8 of Section 578 of the Code of 1907.

Yours very truly,

EMMET S. THIGPEN,
Attorney General.

PRISON INSPECTION:—To abate conditions of jails in cities of less than 10,000, the Governor should give a written order to the State Prison Inspector to proceed.

November 29, 1918.

Hon. S. W. Welch, M. D.,
State Health Officer,
Capitol.

Dear Sir:

I am in receipt of your letter of the 24th instant, having reference to the bad condition of the city prisons or

jails of the towns of Sheffield and Tuscumbia, and note your request for my opinion as to your authority to relieve this situation, and for directions as to what steps to take to abate the abuses of these two prisons.

The legislature passed an act approved April 22d, 1911, (Acts of 1911, pages 631-2), in the first section of which it is enacted that upon the written order of the Governor it shall be the duty of the State Prison Inspector to inspect a number of named places, and "any and all places designated by the Governor." Section Two is in the following language:

"Sec. 2. That the same powers and authority are hereby conferred upon the State Prison Inspector, with reference to such inspectors (inspections) as are, or may be, conferred upon him by law with respect to jails."

I think the word inspectors where it occurs in section two should really read "inspections." So you will see, therefore, that under the provisions of the act I have quoted from, where the Governor gives a written order to the State Prison Inspector, it would become his duty to inspect the jails or prisons of any place, and in so doing he would be governed by the provisions of the act of the legislature of April 8th, 1911 (Acts of 1911, pages 356-365) creating the office of the State Prison Inspector, &c.

The original act creating the office, as you will observe from a reading of it, applies only to cities of ten thousand population or more, and the subsequent act of the legislature is, in my judgment, a provision to make possible the proper inspection and regulation of such places in smaller towns where in the judgment of the Governor they should be inspected and regulated.

I think, therefore, that the proper course for you to pursue is to bring to the attention of the Governor the conditions existing in the city jails of Sheffield and Tuscumbia, whereupon he will doubtless issue a written order to the State Prison Inspector to give those jails immediate attention, and the State Inspector will then proceed under the provisions of the act creating his office to dispose of the matter.

I am enclosing you two copies of this opinion for your convenience in transmitting the matter to the Governor and State Prison Inspector respectively.

Yours very truly,

EMMET S. THIGPEN,

Attorney General.

CHILD LABOR LAW:—Employment certificates may not be issued by principals of private schools except by authority of principal of public school or County Superintendent of Education.

Dr. Glenn Andrews,
State Prison Inspector,
Capitol.

December 3, 1918.

Dear Sir:

Replying to your inquiry of the 2d instant, as to whether or not the principals of private schools have the right to issue employment certificates to children requiring same under the Child Labor Law, and whether or not the words "principal of schools" refer to public schools, and whether or not the principal of such school is the proper authority to issue such certificates, I beg to advise as follows:

Section 9 of the act approved February 24, 1914 (Acts of 1915, pages 193, 196), makes it the duty of the superintendent or principal of schools in cities or towns to issue the employment certificates mentioned in section 8 of that act, "or to authorize a person in writing to issue such certificate acting in his name." It is further provided that when there is no superintendent or principal of schools, said certificate shall be issued by the county superintendent of education or by person authorized by him in writing.

I would conclude, therefore, that the best practice to be adopted would be for the principal of the private school to get the principal of the public school, or the county superintendent of education, as the case might be, to give him in writing authority to issue such certificates, acting in the name of the principal of the public school or county superintendent, as the case might be. This would be in compliance with the law and would avoid any possible confusion.

Yours very truly,

EMMET S. THIGPEN,

Attorney General.

SCHOOL DISTRICTS:—Where a district which had voted the 3-mill school tax is divided into two districts, the proceeds of the tax should be prorated between them by the County Superintendent of Education.

Hon. Spright Dowell,
Superintendent of Education,
Capitol.

December 11, 1918.

Dear Sir:

With reference to the matter now pending in special school tax district No. 13, Escambia county, which the writer has discussed at some length with Mr. Gunnels, I now have before me the files consisting of correspondence between the county board of Escambia County, Supt. Ledbetter, and your office containing letter of Mr. Gillis of the 4th instant directed to the Attorney General and the Superintendent of Education, Mr. Ledbetter's letter of November 29th to the Attorney General, and his letter of November 25 to Mr. Dowell and Mr. Dowell's reply thereto dated November 27, and I have given the matter considerable study and consideration.

As I understand the facts, they are substantially as follows: The county board of education of Escambia county established special school tax district No. 13, wherein the electors of that district voted the three-mill school tax some time ago under the provisions of the act of 1915, this district being at the time entirely a rural district. Thereafter in July of this year when a census was taken, the City of Atmore being within the special district above mentioned was shown to have 2016 inhabitants, and was then declared to be a school district within itself and has since organized its city board of education. So that now in special school tax district No. 13 we have the district of Atmore as a city district duly organized and what is left of the original special school tax district No. 13, constituting what we may term district No. 13; that is to say, the part of the original district which now lies outside of the present Atmore district.

The question propounded in this correspondence and in the discussions concerning the situation is substantially this: How should the revenue derived from this special school tax be handled; should it be paid to the county treasurer of public school funds and by him prorated, or appor-

tioned between the Atmore district and the outlying territory, or should it be paid to the city treasurer of Atmore to be expended by him.

As I understand the provisions of section 5 of the act authorizing the levy and collection of the special three-mill school tax (Acts of 1915, p. 262), it is the duty of the tax collector, when such a levy is made, to collect the same as other taxes are collected, to keep the amount separate and apart from all other funds, and to keep a clear and distinct account thereof, and to turn the same over to the county treasurer of public school funds, whose duty it shall be to receipt therefor, and pay out same on monthly payrolls on the authority and approval of the county board of education; provided that the funds arising from levying the special tax for school purposes in any school district, shall be used for the *exclusive benefit of the public schools of such district*; and in the case of incorporated cities and towns shall be paid over to the treasurer of said incorporated city or town, to be used for the exclusive benefit thereof."

In the absence of an agreement between the Atmore city district and the district No. 13 (the outlying portion of the original district), with reference to the distribution of this special tax it is my opinion that the same should be regularly paid to the county treasurer of public school funds, and the county board of education should properly apportion the same so that the two districts now existing in the original school tax district shall receive their just part of the funds. This seems to be the plain purpose and intent of the law and it is the only way I can see to handle the matter satisfactorily in the absence of an agreement between the two sets of authorities. In my judgment and opinion it would be improper to pay the entire fund to the city treasurer of Atmore because the district of the city or Atmore is less than the original district and would leave unprovided for a large territory without the city district.

I am returning to you herewith the file which was left with me and will be glad to go further into the matter if I have not made myself plain, or have not fully covered the questions which you wish to be informed on.

Very truly yours,

EMMET S. THIGPEN,

Attorney General.

WAREHOUSES:—A Federal licensed warehouse which has made bond to the United States must also make bond to the State of Alabama.

December 12, 1918.

Hon. Thos. W. Sims,
Chairman, State Board of Equalization,
Capitol.

Dear Sir: Re: Talladega Warehouse.

I beg to acknowledge receipt of the letter from Judge E. A. Hammett, Judge of Probate of Talladega County, relative to the above, and also of the file of papers connected therewith. In reply will state that it is my opinion that the said Talladega Warehouse should execute a bond as provided by section 6128 of the Code of 1907, of Alabama, payable to the State of Alabama, although it has also executed the bond to the United States. Upon a reading of section 6123, et seq. of the Code of 1907, it is further my opinion that before the Judge of Probate should issue a license to this warehouse, he should require it to execute the bond required by section 6128.

I am herewith returning to you the letter of Judge Hammett, together with other papers in this cause.

Very truly yours,
EMMET S. THIGPEN,
Attorney General.

COUNTY EXPENSES:—Commissioners' Court may allow Judge of Probate additional monthly sum for expenses incurred in looking after roads.

December 11, 1918.

Hon. J. H. Craig,
State Examiner,
c/o Probate Judge,
Union Springs, Ala.

Dear Sir:

Yours of the 19th is received. I note your inquiry as to whether or not the judge of probate would be entitled to the twenty dollars per month voted to him by the commissioner's court on November 14th in addition to the amount allowed under the Code for road work and inspection, and have carefully read the recital of the minutes of the court set forth in your letter.

I take it that this twenty dollars per month is not compensation to the probate judge, but a mere reimbursement of expenses incurred by him in looking after the roads of the county. The minutes so state and it requires no stretch of the imagination to assume that twenty dollars per month is a law estimate of the cost of gasoline and oil if he is really diligent in looking after the road conditions, especially where convicts are being used on the roads.

Under the Acts of 1915, p. 573, section 1, a very large discretionary power is conferred upon the court of county commissioners with reference to the public roads, and under the authority of the case of Ensley Motor Company v. O'Rear, 71 So. 704, I believe the action of the court in thus reimbursing the probate judge is amply justified. I do not think section 7434 of the Criminal Code would have any application whatever to this particular case. In fact, as I understand the situation this is not a matter of compensation, but of reimbursement of expenses incurred on behalf of the court.

The only suggestion that I would make as to the minutes is, that there should be a limitation for it, that the judge should only draw this sum for such months as he is actively engaged in the inspection of the roads; in other words, should this inspection work be discontinued at any time, of course, the expense allowance would discontinue also. However, that is a matter which the county court should be careful to look after.

Yours very truly,
EMMET S. THIGPEN,
Attorney General.

NOTARY PUBLIC:—Acknowledgment of mortgage to corporation should not be taken by a notary who is a stockholder of the corporation.

December 14, 1918.

Mr. W. H. Kohn, Secretary,
Sullivan Bank & Trust Company,
Montgomery, Ala.

Dear Sir:

I acknowledge receipt of your letter of the 13th instant in which you say:

"Kindly advise me the legality of a Notary Public's certificate to a mortgage, when said mortgage is in favor of a corporation and said Notary Public is a stockholder in said corporation. Has there been a ruling by the Supreme Court of Alabama in a case of this kind?"

While it is contrary to the policy of this department to render opinions to private individuals, yet on account of the general public interest in this particular inquiry, I am complying with your request and giving you the following opinion:

It is not proper, legally speaking, for a notary who is financially or beneficially interested in the transaction to take acknowledgment or make certificate &c. Because of the probative force accorded to the certificate, as well as the usually important consequences of the interest itself, public policy forbids that the act of taking and certifying the acknowledgment should be exercised by a person financially or beneficially interested in the transaction. *Hayes v. Southern Home Building, etc., Association*, 124 Ala. 663, 26 So. 527; 82 Am. St. Rep. 216; *Monroe v. Arthur*, 126 Ala. 362, 28 So 476; 85 Am. St. Rep. 36. It has been held that the fact that any officer disqualified by interest is the only one authorized to take such acknowledgment will not render it more effective. *Hammers v. Dole*, 60 Ill. 307.

Generally, however, employment as agent or attorney in a matter gives a notary no such interest as to invalidate an official act done by him therein; and a notary who is an officer, but not a stockholder, in a corporation is not disqualified from certifying a document in its favor. *Florida Savings Bank, etc., v. Rivers*, 36 Fla. 575, 18 So. 850, in which case it was held that a notary although an officer of the corporation, might take acknowledgment of a mortgage in its favor, as it did not appear that he was a stockholder. See 29 Cyc. 1092 et seq.; 1 Cyc. 553 and notes.

You will see, therefore, that where the notary has a financial or beneficial interest, he is disqualified from acting.

Yours very truly,

EMMET S. THIGPEN,
Attorney General.

LICENSES:—A hosiery mill is included in classification "cotton mill or cotton factory."

December 17, 1918.

Hon. Gordon T. Welch,
County Solicitor,
Talladega, Ala.

Dear Sir:

Yours of the 16th instant is at hand and noted. I note that you state that your county license inspector has sworn out a warrant for a hosiery mill for failure to pay State license under subsection 36 of section 1 of the revenue law; that said mill does not use raw cotton, but makes socks from yarn exclusively, which it buys from other parties.

The section of the revenue law above referred to provides a license or privilege tax "for every person operating any cotton seed oil mill, cotton mill *or cotton factory*."

Of course the word "factory" is an abbreviation or contraction of the word "manufactory," and simply means a place where things are manufactured. If this were a civil suit, there would be no difficulty in saying that the sock factory mentioned would be comprehended under the term cotton factory, provided the socks therein manufactured were made exclusively from cotton yarn. However, in the construction of tax laws, the rule of strictness applies and there is a serious doubt in my mind whether a knitting mill such as the present concern seems to be, is liable under subsection 36. However, as the whole question turns on the definition of "cotton mill or cotton factory," I hold that this sock factory, making socks exclusively from cotton yarn, is a cotton factory within the purview of this law.

I note what you say with reference to the civil suit before Judge Coleman several years ago. If his holding in that case was correct, then in a case where the rule of strict construction applies, the knitting mill is exempt.

I think probably the only satisfactory thing to do is to proceed with the case and let the Supreme Court say whether or not a knitting mill manufacturing socks from cotton yarn exclusively, is a cotton factory within the meaning of this law.

Very truly yours,
EMMET S. THIGPEN,
Attorney General.

OFFICE HOLDERS:—State Health Officer not a State, county, or municipal officer, within the meaning of section 281 of the Constitution of Alabama, and may therefore hold another office of profit under the Federal Government.

December 17, 1918.

Dr. S. W. Welch,
State Health Officer,
Capitol.

Dear Sir:

In compliance with your request of the 16th instant, I herewith render opinion on the following queries:

(1) "Can the State Health Officer of Alabama hold and administer his office as such, and at the same time hold an office of profit in the United States Public Health Service."

(2) "Is the State Health Officer of Alabama a State Officer within the meaning of section 281 of the Constitution of 1901?"

1. A reply to the first query propounded would be rather difficult were it not for the holding of Mayfield, J., in the case of the State v. Sanders, 187 Ala. 79, the head note of which case is fully supported by the opinion and is in the following language:

"The State Health Officer, while an officer of the board is not a State, county, or municipal officer within the meaning of section 281, Constitution of 1901, and hence, there is no inhibition upon the increase or diminution of his salary during the time for which he was elected or appointed. (See sections 698, 702 and 704, Code 1907.)"

Mr. Justice Mayfield, in the case above cited, entered very fully and completely into the proposition, and has held flat footed that the State Health Officer is not an officer of the State within the meaning of section 281 of the Constitution, but is the creature entirely of the State Board of Health, which is the creator and master, and which has the unqualified right to pay him any salary it pleases (not exceeding \$5000 per annum) and retain him any length of time they see fit or to dismiss him—subject to such con-

tract as may be of force at the particular time; or, in other words, that he is purely and simply the *employee* of the State Board of Health, and *not* an officer of the State within the purview of the constitutional inhibition.

2. The foregoing is a complete answer to the second query.

As stated above, there can be no possible question, if the Sanders case stands, that you have a perfect right to accept any office you please from the State or Federal authorities so far as the constitutional objection is concerned.

Very truly yours,
EMMET S. THIGPEN,
Attorney General.

ACCOUNTING:—County Treasurer may accept script in payment of fines to county.

December 17, 1918.

Hon. J. H. Craig,
Examiner Public Accounts,
Capitol.

Dear Sir:

I acknowledge receipt of your request for an opinion as to whether or not the treasurer of a county may lawfully accept script on fines due to the county.

Sections 6659 to 6670 inclusive is the law on the subject, subject only to such local acts affecting some of the counties, provided such local acts are constitutional and of force. I do not think it is necessary for the purpose of this inquiry to enter into any discussion of such possible local legislation.

Section 6666 is in the following language:

“Witness’ certificate; how payable; clerk not entitled to fee for issuing. It is the duty of the clerk of the court to issue a certificate to each witness appearing on the part of the State, stating therein the amount of compensation to which he is entitled, the facts which, under the provisions of section 6660 (4584) make it a good claim against the county, which certificate is receivable in payment of any debt due to the county for fines and forfeitures, and payable by

the treasurer out of any fines and forfeitures in the county treasury; the clerk who issues the certificate hereinabove mentioned shall not be entitled to demand or charge any fee for performing this duty."

This has been the recognized law of the State of Alabama for many years and I know no reason why it is not of full force at this time. In other words, a proper certificate is receivable in payment of any debt due to the county for fines and forfeitures, and is payable by the treasurer out of any fines and forfeitures.

I think, therefore, that the treasurer is acting in compliance with this provision of law when he accepts such certificates in due form in payment of debts due to the county for fines and forfeitures.

Of course, when the treasurer accepts these certificates, they should be properly and plainly marked, and I do not think you would be called upon as a public examiner to pass them unless they are properly and appropriately marked, showing that they were received in payment of a particular fine or fines. However, as I understand, you merely wish an opinion with respect to the legality of the payment of fines due to the county with these certificates, and do not care for advice on the question of the records of the treasurer.

I am returning Mr. Acuff's letter herewith.

Very truly yours,

EMMET S. THIGPEN,

Attorney General.

CHILD LABOR LAW:—The "news-boy" section does not apply in cities of less than 25,000; no exemption for news-boys under section 1; a boy under 14 may not carry newspaper while schools are in session.

December 19, 1918.

Dr. Glenn Andrews, M. D.
State Inspector,
Capitol.

Dear Sir:

Acknowledging receipt of yours of the 18th, enclosing a letter from Miss Josephine Wilson, Principal, Wilmer Ave-

nue School, Anniston, Ala., enclosing with which last letter is a note to Mrs. Saunders, and her reply thereto, and replying to your inquiries, I beg to advise you as follows:

1. Section 13 of the Acts of 1915 set out on pages 197 and 198 of the Acts of 1915, applies only to cases in cities of twenty-five thousand or more population, and has no reference to smaller towns and cities.

2. Section 1 of this Act, (page 193) clearly prohibits children under fourteen years of age from being employed, permitted or suffered to work in any gainful occupation, except agricultural or domestic service, with this proviso:

“Provided, however, that boys twelve years of age and over may be employed in business offices, and mercantile establishments in cities or towns under twenty-five thousand population, according to the latest Federal census, during such time as the public schools in the city or town in which the child resides, are not in session.”

The effect of Section 1 is to absolutely prohibit children under fourteen years of age being employed at anything except agricultural or domestic service, with the single exception that boys of twelve and over may be employed in business offices and mercantile establishments in towns under twenty-five thousand population, when the schools in such towns are not in session.

3. I do not think that under Section 1 the distribution of newspapers or periodicals can be regarded as working in a mercantile establishment. Furthermore, the particular inquiry contemplates the case of a boy engaged in carrying newspapers or periodicals at a time when the schools of his city are in session, and, therefore, the exemption would not apply.

I trust you will find this a full answer to your inquiry. I am returning herewith Miss Wilson's letter, and enclosure therewith.

Yours very truly,

EMMET S. THIGPEN,
Attorney General.

OFFICE HOLDERS:—Term of office of member of County Board of Education whose successor died after election but before qualification; method of filling vacancy.

December 23, 1918.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

I have your letter of the 8th inst., relative to election of County Board member in Conecuh County, in which you say:

“Mr. H. W. Dunn received a majority of votes cast at the November election, but died before taking the oath of office, the retiring member receiving the next highest number of votes. The Board did not meet and organize within ten days prescribed under Section 4 of the present law, which also carries with it a proviso that any member of the Board of Education shall hold office until another member has been elected and qualified.”

You also request me to advise you as to the proper manner to fill the vacancy.

In reply to your letter will state that while it is true that the Act creating the County Board of Education provides “that any member of the Board of Education shall hold office until a successor has been elected and qualified” it has been held by the Supreme Court of Alabama that the phrase “until their successors have qualified” means a reasonable time only, and cannot be held to extend the term beyond such reasonable time for the election and qualification of a successor.

Lane vs. Cobb, 92 Ala. 636.

Council vs. Hughes, 65 Ala. 201.

Little vs. Foster, 30 So. 477.

The law does not say what a reasonable time, but in my opinion from the time of the November election up until the present time, would be more than a reasonable time for a successor to qualify, and, therefore, the term of office of the member whom H. W. Dunn was elected to succeed has ended.

Section 6 enumerates the duties to be performed by the County Board of Education, and Sub-division 3 of that Section reads as follows:

"Elect to hold office until the next regular election as provided under this Act, the successor to any member of the County Board of Education, whose place may have become vacant by death, resignation, or other cause; provided, that in case the County Board fails for a period of thirty days to fill said vacancy, the State Superintendent of Education shall have authority to appoint a member to fill the same."

The term of office of the man whom Mr. Dunn was elected to succeed having expired, and Mr. Dunn having died, clearly a vacancy exists, and it is my opinion, and I so advise you, that the County Board of Education should elect a successor to the member whom Mr. Dunn had been elected to succeed.

The law does not define what is a reasonable time within which Mr. Dunn should have qualified, and your letter does not state the date of the death of Mr. Dunn. I should think that thirty days would be held a reasonable time for Mr. Dunn to have qualified. If, however, his death occurred within that time, it is barely possible that the vacancy should be held to exist from the date of his death. Therefore, if more than thirty days have passed since the date of Mr. Dunn's death, it might be held that the State Superintendent of Education has authority to appoint a member. Otherwise, the County Board of Education should elect.

I am herewith enclosing the letters sent with your letter.

Yours very truly,

EMMET S. THIGPEN,
Attorney General.

OFFICE HOLDERS:—Thirty days is reasonable time within which members of County Board of Education should qualify. Failure to file expense account does not affect right to serve after member has received certificate of election.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

I have before me the letter of Hon. George C. Metz, County Superintendent of Education of Cullman County, upon which you request my opinion. The letter reads as follows:

“We had two members of the county board of education to elect in the recent election, which was held on the first Tuesday in Nov. 1918. W. F. Gladney, of Hanceville, Ala., was elected to fill the unexpired term of L. E. Cook, who resigned. Mr. Gladney qualified on the 14th of Nov. 1918. The other member was Mr. J. M. Bright, of Cullman, Ala., who was elected to succeed Mr. A. Dreher. Mr. Bright qualified on the 22nd of Nov. 1918. Mr. Bright failed to file his expense account with the Probate Judge, as is required by the election laws, and he gave as his reason for not filing same, that he had no expense. The thing I want to know is this; have these men complied with the election laws, and are they eligible to serve as members of the county board of education, unless they have complied with the law? I would thank you for an opinion on this matter.”

In reply beg to state that it is my opinion, and I so advise you, that if the parties named in Mr. Metz's letter have received the certificate of election, and have qualified then they are entitled to serve as members of the County Board of Education.

The law does not prescribe any certain length of time within which they should qualify, and does not provide that their failure to qualify within any certain time shall vacate the office. In my opinion thirty days from the election would be construed a reasonable time within which they could qualify.

As to the failure of Mr. Bright to file his expense account, if he has received a certificate of election, that would

not affect his right to serve as a member of the County Board of Education.

Yours very truly,
EMMET S. THIGPEN,
Attorney General.

SHERIFFS:—Chief deputy not required to make bond to State; sheriff is responsible for acts of deputy and may require bond to himself.

December 30, 1918.

Messrs. H. A. & D. K. Jones,
Tuscaloosa, Ala.

Dear Sir:

I am in receipt of your letter of the 28th instant, in which you ask our opinion as to whether a sheriff's chief deputy is required by our law to qualify by making a bond.

In my judgment and opinion, the sheriff's chief deputy is not required by law to make any bond. In the case of *Andrew v. State*, Somerville, Judge, held that a special deputy was an officer of the State, but only in such case as was then under consideration. You might read the case. The chief deputy sheriff is really the creature of the sheriff himself and acts for the sheriff; in other words, he acts in the name of the sheriff, and the sheriff is responsible for his acts. It would seem, therefore, that, while the sheriff might require a bond from him, that the law does not require it. See *Wise v. Curl*, 177 Ala. 324; 88 So. 285; *King v. Gray*, 189 Ala. 686, 66 So. 643.

Very truly yours,
EMMET S. THIGPEN,
Attorney General.

SHERIFFS:—Sheriff's feed bill for escaped prisoners should be paid for time prisoners were actually fed by him.

December 30, 1918.

Hon. Geo. C. Richardson, Sheriff,
Marion, Ala.

Dear Sir:

I am in receipt of your letter of the 28th instant. It is not plain to me from your letter whether your bill for feed-

ing the two escaped prisoners which was paid you by the Auditor, and then by you refunded to the State Treasurer was for time other than that in which they were actually fed. Of course you would not be entitled to a feed bill when the prisoners were not actually present to feed, but I am inclined to think and so advise you, that you are clearly entitled to be paid your fees for feeding these men for such time as you actually fed them, unless it be shown that these prisoners escaped by your fault. And even then, I know of no law which would justify your being deprived of these fees. The act of April 8, 1911, (Acts of 1911, p. 355), specifies "That the sheriffs shall receive pay for feeding prisoners *in jail* under charge or conviction of any indictable offense, to be paid by the State according to the following scale," and then sets out the scale. It is clear to my mind that you are entitled to pay for every day in which you fed these prisoners, and I so advise you.

Yours very truly,
EMMET S. THIGPEN,
Attorney General.

OFFICE HOLDERS:—An office is vacated when the holder absents himself for an unreasonable length of time.

December 31, 1918.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

In the matter of the vacancy now existing on the county board of education in Franklin County, on account of the absence of member, Hon. Foy Guin, about which I wrote you on November 14th, on being now advised that Mr. Guin was not a commissioned officer in the United States Army in France, but was a private in the United States Army in France, and in reply to your question whether or not this would make any difference in my opinion of November 14th covering the matter, I beg to advise that it would in no sense alter said opinion. The test of the matter in a case like this, is not the sort of employment which causes the absence, but is the fact of vacating the office. Under the

authorities cited in my opinion of November 14th, you will see that where the incumbent of an office absents himself therefrom for an unreasonable length of time, that office is thereby vacated.

Very truly yours,
EMMET S. THIGPEN,
Attorney General.

BANKS:—Superintendent of Banks cannot furnish copy of examiner's report to board of directors of bank under act creating Banking Department.

January 7, 1919.

Hon. D. F. Green,
Superintendent of Banks,
Capitol.

Dear Sir:

Acknowledging yours of even date, in which you ask an opinion as to whether or not the Superintendent of Banks would have the right to send a copy of the report made to the Department by an Examiner, to the Board of Directors of a bank, I beg to advise you as follows:

Sec. 12 of the act creating the Banking Department, (Acts of 1911, p. 67,) provides: (*Italics supplied*)

"The information which shall be obtained by the superintendent of banks, or any bank examiner in making an examination into the affairs of any bank, shall be for the purpose of ascertaining the true condition of the affairs of said bank, and *shall not be disclosed by the party making the examination to any person*, except that the examiner shall make report of the condition of the affairs of the bank ascertained from the examination, to the superintendent of banks, *and except that the superintendent may make publication or take action as a result of said report as herein provided.*"

Again, in sec. 15 of said act, it is provided that where the report published by the bank in a newspaper contains discrepancies as against the examiner's report, not due to clerical errors, "it shall be the *duty* of the superintendent to forthwith publish a true and correct report *as shown by*

the sworn report filed with the superintendent," &c. Note that here it is made a duty to publish.

Sec. 36 of the act is as follows:

"Any bank examiner, office assistant or superintendent of banks who shall knowingly and willfully disclose the condition and affairs of any bank ascertained by an examination, or who shall knowingly and willfully, *except to the extent as authorized by law*, report or give information as to who are depositors or debtors of a bank where such information is obtained by an examination of such bank, shall be guilty of a misdemeanor and, upon conviction, must be fined not less than one hundred nor more than one thousand dollars."

It may be the intent and purpose of the latter part of sec. 12, quoted above, to leave to the discretion and judgment of the superintendent of banks the matter of the "publication" of information resulting from these official examinations; and such is the inclination of my mind on the subject. However, the provisions of sec. 36, also quoted above, bear a tendency against this construction of sec. 12. And, while I feel that, under the law, you would be amply justified in furnishing to the board of directors of a bank which has been examined by one of your examiners a copy of the report of such examination, if in your judgment it was a wise and proper thing to do, yet, at the same time, it may be much better to have the incoming Legislature to relieve the situation by amending the law so as to specifically provide that the Superintendent of Banks may *in his discretion* furnish such a copy to the board. A direct provision of law on the subject would relieve all possible doubt, and I recommend to you that you take the matter up in due course, and have the matter covered by an amendment to the act, which can be accomplished now in a very short time. The Legislature meeting so soon, it would seem to me wisest and best to adopt the suggested course.

I think you are quite right in desiring this latitude, as I can readily see where it may be of much benefit and service to the banking system of the State.

Yours very truly,
EMMET S. THIGPEN,
Attorney General.

CHILD LABOR LAW:—Boys under 16 may be employed in shipbuilding plant, but not as rivet passers.

Dr. Glenn Andrews,
State Prison Inspector,
Capitol.

January 10, 1919.

Dear Sir:

I am in receipt of yours of even date, enclosing letter from Miss Augusta Martin, D. I., written from Mobile, and note your inquiries:

1. Whether or not "manufacturing establishment," as it occurs in section 8 of the Child Labor Law, embraces shipbuilding plants?

2. Whether or not under sections 5 or 6, or any other clause of the law, a child engaged in the passage of hot iron, as referred to, (in Miss Martin's letter, "Where they catch red hot rivets thrown from a forge in a tin receptacle and pass them to the man who puts them in the drilled hole,") could be stopped from working?

In reply, I beg to advise you as follows:

1. "Manufacturing establishment," as used in sec. 8 of the act would cover and include a shipbuilding plant, in my judgment and opinion, A. & E. Ency., 2nd ed., vol. 19, pp. 292, et seq., and notes. See, also, Words & Phrases.

2. Subdivision 8 of sec. 6 provides that no child under the age of 16 years shall be employed, &c., "on scaffolding"; but Miss Martin does not say whether or not these boys work on scaffolding. Subdivision 9 provides that they must not be employed in "heavy work in the building trades."

There is nothing in section 5 that is applicable. There is no doubt that if the boys referred to work on scaffolding, they could be stopped under sec. 6, and I am inclined to think that rivet passing, as described by Miss Martin, would constitute "heavy work in the building trades," and that, therefore, you would be justified in stopping boys under 16 from working at this particular employment under that clause. Such is my opinion and I so advise you. I know of no construction or interpretation of this by the courts.

Trusting this fully answers your inquiries, I am,

Yours very truly,

EMMET S. THIGPEN,

Attorney General.

SHERIFFS:—A sheriff is entitled to collect fees in county court without paying same into the county treasury, unless he is a salaried officer, or unless other provision is made for his compensation.

January 14, 1919.

Hon. J. H. Craig,
Examiner of Public Accounts,
Capitol.

Dear Sir:

I acknowledge receipt of your letter of the 13th instant, in which you ask what disposition to make of the sheriff's fees under section 1 of the Acts of 1915 (Acts of 1915, p. 603). If the provision of this act was strictly complied with, the sheriff would probably lose his fees, which was clearly not within the contemplation of the law-makers. The provision of this act of 1915 is evidently designed to apply to the county court officers as such, and in my opinion, would not affect the fees of the sheriff and his deputies.

It is my opinion and I so advise you that the sheriffs are entitled to collect their fees in the county court without paying them into the county treasury; provided no such sheriff is a salaried officer, and no provision is otherwise made for compensating him for such services.

Yours very truly,
EMMET S. THIGPEN,
Attorney General.

CONVICT SYSTEM:—Contract of Montevallo Mining Company guarantees that State shall receive same average net earnings from each convict as at other State convict mines. State may make concession by deducting time of convicts when not actually employed on account of illness; though the rule is that the illness of the convict is the burden of the hirer.

January 14, 1919.

Hon. W. E. Matthews,
President Board of Convict Inspectors,
Capitol.

Dear Sir:

In reply to your verbal request of recent date for a written opinion touching the construction of the contract of

February 7, 1918, between W. E. Matthews, as President of the Board of State Convict Inspectors of the State of Alabama and the Montevallo Mining Company, as to the basis on which settlement should be made by said Company, and also whether or not you are legally authorized to make any concessions or deductions on account of the illness of convicts during the epidemic of "flu" in such settlement, I beg to advise you as follows:

1. Paragraph 6 of the contract, when construed, as it properly should be, with paragraph 4 (which provides the minimum scale of wages to be paid in any event under the contract), is a guarantee by the Montevallo Mining Company that "the average net earnings of the State per man" from the mines operated with the convicts hired from the State by the Montevallo Mining Company, shall "equal the average earnings per man at other State convict mines." So that if the State should be fortunate in getting a high price from other contracts the effect would be to enhance the value of this contract to the State; and on the other hand, should the State be unfortunate in having to take a very low price for its convicts in other mines, it would possibly result in the State collecting only the minimum price set out in section 4 of its contract.

2. As to deductions for illness of convicts. You would not be authorized under the law to make any settlements other than on the basis of this contract. In other words, you, as the agent and servant of the State, have no legal right to make concessions, but are bound by, and must treat the Montevallo Mining Company as bound by the terms of the contract as made. The illness of the convicts being no fault of the State, and the State having fully complied with the terms of this contract on its part, I am clearly of the opinion, and so advise you, that the State is entitled to the full amount due, as indicated above, under section 6. It might be that under the latter clause of section 4, you would be justified in making some concession by construing the same to mean that you were to deduct the time of convicts when not actually employed on account of sickness. But there is nowhere in the contract any guarantee by the State against the illness of the convicts, and it is and has always been customary for the operators using convicts to bear this feature of loss. Of course there is, necessarily, some sickness in all camps, and it is and

has always been regarded as the burden of the hirer. However, as you desire to know the limit to which you may lawfully go in that matter of the settlement, I feel justified in remarking that you should see fit to so construe the meaning of the last clause of section 4, you might thus be enabled to make whatever concession that construction would amount to. It is my opinion, nevertheless, and I so advise you, that such is not the true intent and meaning of said clause.

I am returning herewith the contract and riders thereto which you left with me.

Yours very truly,
EMMET S. THIGPEN,
Attorney General.

BANKS:—Bank should obtain permission of Superintendent of Banks to increase capital stock; officers of bank failing to do so are guilty of criminal offense; Superintendent of Banks should report the transaction as "unsafe."

Hon. D. F. Green,
Superintendent of Banks,
Capitol.

January 18, 1919.

Dear Sir:

I am in receipt of your letter of even date, and have carefully noted the statement of facts therein set forth. With those facts in mind, I beg to advise you with respect to each of your four inquiries in the order in which you have made same, as follows:

1. Under the provisions of section 23 of the State banking law as amended by section 12 of the law of 1915, it was clearly the duty of the Bank of Carrollton to apply to your Department for permission to make this increase in its capital stock. There can be no doubt that this was an increase in the capital stock of the bank, and, while under its original charter the bank was authorized to issue this additional stock, yet it cannot be said that it was authorized to do so other than in a legitimate manner; that is, they could only do so in full compliance with the present law on the subject. See section 3480, Code of 1907, and the provisions of the present banking laws applicable to such a case. There is no question whatever that it was necessary for it to obtain permission in writing

from you before this increase was made in conformity with section 23 as amended.

2. I necessarily conclude that, inasmuch as this permission was not obtained, the officers of the Bank of Carrollton are guilty of a criminal offense as defined in said section 23 as amended.

3. Under the provisions of section 10 of the banking law of 1911, I think unquestionably it became your duty to submit to the board of directors of this bank, the manner of this particular transaction when the same was brought to your attention by an official report of one of your examiners, as a transaction which should be properly classified "unsafe." The manner in which this stock transaction was handled was a positive fraud upon the other stockholders of the bank, because when this Five Thousand (\$5000.00) Dollars of stock was sold to one individual at par, at a time when stock was worth 2.53 it had the effect to reduce the value of the holdings of all the other stockholders. You would certainly have a right to conclude that such a transaction on the part of the officers of a bank is "unsafe."

4. It is my judgment and opinion, and I so advise you, that the action of the officers and directors of this bank in voting the authorization of the sale of this stock at par rendered them criminally liable under section 42 of the act of 1911.

If I have not given you a full answer to your inquiry, or if there is anything further that you desire, you will please inform me.

Very truly yours,
EMMET S. THIGPEN,
Attorney General.

OFFICE HOLDERS:—Offices of tax assessor and tax collector are legislative offices.

January 22, 1919.

Hon. Thomas W. Sims, Chairman,
State Board of Equalization,
State Capitol, Montgomery, Ala.

Dear Sir:

I beg leave to acknowledge receipt of your letter of January 22, 1919, in which you ask this Department to advise

you whether or not the offices of Tax Assessor and Tax Collector are Constitutional offices; and in answer thereto I beg to advise that these offices are not Constitutional offices, but are offices created by statute, known as Legislative offices.

Yours very truly,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS:—License inspectors appointed by the State Tax Commission may be removed by the Commission at any time.

January 23, 1919.

Hon. Thos. W. Sims, Chairman,
State Board of Equalization,
Capitol.

Dear Sir:

In reply to your inquiry as to what is the term of office of license inspectors, I have the honor to advise that, inasmuch as the statute authorizing the appointment of license inspectors (License Act, approved Sept. 14, 1915, sec. 6) specifies no particular term of appointment, or ground of removal, I am of the opinion that the power to depose incumbents is an incident of the power to appoint, and that the license inspector holds at the will of the appointing power, the State Board of Equalization, and may be removed at any time without notice or hearing, the length of the term being left purely within the discretion of the appointing power. This conclusion is supported by the case of the State ex rel, Fox v. Alt, 26 Mo. App. 673; ex parte Hennen 13 Pet., 230; Dillon Municipal Corporation, 5th Ed. sec. 473, and cases there cited.

Very respectfully,

J. Q. SMITH,
Attorney General.

ACCOUNTING:—State depositories are authorized to honor checks and other documents signed by chief clerk in name of State Treasurer.

January 23, 1919.

Hon. R. L. Bradley,
State Treasurer,
Capitol.

Dear Sir:

Your inquiry of Jan. 22d as to whether the different State depositories should honor checks and other documents signed in your name by your chief clerk, received.

In reply, I will say that I am of the opinion that any State depository will be authorized to honor any such checks or other documents which your chief clerk may sign for you under authority from you. In order that the depositories be advised of the authority of your chief clerk, I suggest that you furnish them with your signature, as written by your chief clerk, and advise them that it is so written, and that they are authorized to honor it as your signature.

This opinion is supported by the holding of the Supreme Court in case of the State vs. Montgomery Savings Bank, 47 Southern, 842; and in Lacey's case, 13 Alabama, 229.

Yours truly,

J. Q. SMITH,
Attorney General.

PRINTING:—Joint resolutions of House and Senate are not required to be printed by section 1661 of the Code of 1907.

January 23, 1919.

Hon. William P. Cobb,
Secretary of State,
Capitol.

Dear Sir:

In reply to your request for advice whether you are required to furnish the contractor who prints laws under the terms of the contract provided for in section 1661 of the Code, with house and senate joint resolutions, I have the honor to advise you that a resolution not being read, referred as required, and submitted to the Governor for his

signature, is not a law—Constitution, sections 61, 63, 66 and 125. It is merely a form in which a legislative body expresses an opinion.

Altamont v. B. O. S. W. Railroad Co., 184 Ill. 47, 51.
El Paso Gas Co. v. City of El Paso, 22 Tex. Civ. App.
309, 312.
City of Girardeau v. Fougau, 30 Mo. App. 551, 556.
Patterson v. Barnet, 46 N. J. Law 62.

It follows that section 1661 of the Code does not contemplate the publishing of the joint resolutions.

Very respectfully,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS:—For office requiring commission, the appointment is not complete until commission issues, and office is therefore vacant where commission has not issued.

January 23, 1919.

Hon. Thos. E. Kilby,
Governor of Alabama,
Capitol.

My dear Sir:

The Attorney General's office has the honor to acknowledge receipt of your communication of the 22d inst., propounding the following quaere:

Where a jury commissioner was appointed by a former Governor (pursuant to Acts 1909, page 305), but who failed to qualify or receive his commission:

First. Is there a vacancy in said office?

Second. Has such appointee a right to now demand his commission, and to qualify? Or conversely, has the present Governor the authority to ignore or revoke such appointment?

In reply I beg to advise as follows:

Where a State or county officer, requires a commission (and a jury commissioner does require a commission) the "appointment" is not perfected or consummated until the commission is issued, and—as said by our Supreme Court in Draper vs. State, 175 Alabama, 547—

"The appointment becomes complete when the last act required of the appointing power is performed. In cases where a commission is required the appointment is complete when the commission is signed by the Executive and sealed if necessary, and is ready to be delivered or transmitted to the appointee."

So long as the commission is held in abeyance the appointment is said to be merely in fieri, or, in other words, it takes the final act to consummate the appointment.

This being true, the present incumbent of a state or county office requiring a commission, who has not received a commission, it would follow is merely a de facto officer, and there is a vacancy in the office, as interpreted by the Supreme Court in Draper's case. It says:

"Indeed it seems to be the policy of our Legislative system that a commission is essential to the exercise of the duties of a commissioned officer, as Section 7447 of the Code makes it an offense for an officer required to have a commission to exercise the duties of the office without first having obtained the commission. This is an old section of the Code, and was amended by implication by new section 1472 of the Code, so far as it might apply to elective officers who had provided themselves with a legal certificate of their election. As to all others, it is still in force, and indicates that all appointments should be made by the issuance of a commission, and which is essential to the exercise of the duties of the office. 'The power to appoint to fill vacancies may exist in two classes of cases: (1) vacancies in offices originally filled by appointment and (2) vacancies in offices originally filled by election. A vacancy exists when there is no person lawfully authorized to assume and exercise at present the duties of the office.'"

I, therefore, have the honor to advise that, in my opinion, your Excellency has the right to make appointments and issue commissions therefor to the office of jury commissioner alluded to in your letter, where the previously attempted appointment was abortive by reason of the fail-

ure to issue a commission; in other words, there is a vacancy in such office.

Very respectfully yours,

J. Q. SMITH,
Attorney General.

HEALTH DEPARTMENT:—Failure of physician to re-record certificate upon removing to new county forfeits the certificate.

January 25, 1919.

Hon. S. W. Welch,
State Health Officer,
Capitol.

Dear Sir:

Replying to your recent communication inquiring whether a medical practitioner who upon removal into a new county had failed to re-record his certificate within the time prescribed by section 1632 of the Code, renders his certificate null and void, I beg to advise as follows:

Section 1629 of the Code provides that a certificate of qualification shall be obtained as a prerequisite to the practice of medicine, and section 7564 makes it a misdemeanor for any person to practice medicine without such certificate, and section 1632 requires that the certificate be filed in the office of the probate judge within ten days after locating in a county, and should the physician after locating in any county, remove to another county, then, that he shall re-record his certificate in the last mentioned county, and the statute *ex vi termini* imposes a pain and penalty of a forfeiture or revocation of his certificate if he fails to comply with the provisions about recording or re-recording as set forth in said section 1632. It may be a harsh penalty, but that is a matter that is addressed entirely to the legislative will and discretion.

No one has a vested right to practice medicine free from State regulation or control; the regulation of so important a subject as the practice of medicine is an exercise by the State of its police power. The granting of a license or certificate authorizing to practice medicine confers no contractual right upon the licensee; he takes the same subject to the supervisory regulation of the State.

It will therefore follow that one whose certificate was forfeited and revoked would not be legally qualified practitioner under our statutes.

Yours respectfully,
J. Q. SMITH,
Attorney General.

ALABAMA POLYTECHNIC INSTITUTE:—Funds allotted to Alabama under Smith-Lever Act of Congress should be administered by the Board of Trustees of the Alabama Polytechnic Institute.

January 30, 1919.

Hon. Thomas E. Kilby,
Governor of Alabama,
State Capitol.

Dear Sir:

Replying to your letter of January 29, 1919, in which you ask the advice of this office on the following matter—whether or not the funds allotted to the State of Alabama under the provisions of the Smith-Lever Act of Congress, approved May 8, 1914, may be administered by the Alabama Polytechnic Institute at Auburn, Alabama, through a Board created by the Legislature for that purpose.

In answer to this question, I wish to call your attention to Section 266 of the Constitution of Alabama of 1901, which is as follows:

“The Alabama Polytechnic Institute, formerly called the Agricultural and Mechanical College, shall be under the management and control of a board of trustees, which shall consist of two members from the congressional district in which the institute is located, and one from each of the other congressional districts in the state, the state superintendent of education, and the governor, who shall be ex officio president of the board. The trustees shall be appointed by the governor, by and with the advice and consent of the senate, and shall hold office for a term of twelve years, and until their successors shall be appointed and qualified. The board shall be divided into three classes, as nearly equal as may be, so that one-third may be chosen quadrennially. Vacancies occurring in

the office of trustees from death or resignation, and the vacancies regularly occurring in the year nineteen hundred and five shall be filled by the governor, and such appointee shall hold office until the next meeting of the legislature. Successors to these trustees whose terms expire in nineteen hundred and three shall hold office until nineteen hundred and eleven; successors to those whose terms expire in nineteen hundred and five shall hold office until nineteen hundred and fifteen; and successors to those whose terms expire in nineteen hundred and seven shall hold office until nineteen hundred and nineteen. No trustee shall receive any pay or emolument other than his actual expenses incurred in the discharge of his duties as such."

You will note from a careful reading of this section of the Constitution that a Board of Trustees is created, and that the institution "shall be under the management and control of a Board of Trustees." The section further provides how the Board shall be appointed, the term of office and how vacancies must be filled.

In the Smith-Lever bill in Section 2 you will find the following language:

"And this work shall be carried on in such manner as may be mutually agreed upon by the Secretary of Agriculture, and the State Agricultural College or Colleges receiving the benefit of this Act.

The word "College" in this instance means the Alabama Polytechnic Institute at Auburn.

In Section 3 of said Smith-Lever Act the following expression is to be found—

"Provided further that before the funds therein appropriated shall become available to any college for any fiscal year, plans for the work to be carried on under the Act shall be submitted *by the proper officials of each college and approved by the Secretary of Agriculture.*"

I am, therefore, of the opinion that under Section 266 of the Constitution the conclusion would be reached that the

Board of Trustees are the *proper college officials of this institution*. This is clearly the purpose and intent of this Section of the Constitution; and I am further of the opinion that the Act of Congress, as set out in the Smith-Lever Act, clearly intends that this fund should be administered by the college authority, which is the Board of Trustees; and I am further of the opinion that a Board created by the Legislature, who should be other than the Board of Trustees of the Alabama Polytechnic Institute, would be in conflict with Section 266 of the Constitution.

I am herewith returning to you Act of Congress, No. 95.

Respectfully submitted,

J. Q. SMITH,
Attorney General.

PUBLIC UTILITIES:—Public Service Commission has no direction over receivers of companies, they being officers of the Federal Court.

January 31, 1919.

Alabama Public Service Commission,
Capitol Building,
City.

Gentlemen:

Replying to your communication of the 29th inst., in which you ask to be advised whether you have the power and authority to cite the receiver of the Birmingham Railway Light & Power Company appointed by the Federal Court, to appear before your body and show cause why "reasonable and adequate service should not be rendered by this company in the city of Birmingham and its environs," I beg to advise as follows:

A receiver is not the representative of the corporation whose property he holds, he is an officer of or arm of the court itself; his possession is that of the court and the property is *in custodia legis*. Nor can he ordinarily pay out or expend any moneys in his hands, as such receiver, without an order of the court, general or special. (Sullivan Timber Company v. Black. 159 Ala. 587-8).

By Federal Statute (4 Fed. Stat. Ann. p. 386) it is made the duty of Federal receivers to manage and operate the

properties confided to their charge "according to the requirements of the *valid* laws of the state in which such property shall be situated." But just what are the "valid" laws of the state is still a matter for the courts and the receiver would be subject to the order and direction of the court as to what he should or should not obey—e.g., one requirement with reference to orders of a Public Service Commission is that its orders must be reasonable (*R. R. Commission v. A. G. S. R. R.* 185 Ala. 350; *L. & N. R.R. Co. v. R. R. Commission*, 191 Fed. 757; *S. A. L. Ry. Co. v. R. R. Commission*, 240 U. S. 324); suppose the court should be of the opinion that the Commission's views of what constitute "reasonable and adequate" service called for too great an outlay or expenditure, in view of the existing condition of the company's finances, a point would immediately be presented for court review—incidentally involving a conflict between State and Federal jurisdiction. And if your orders should in fact necessitate or require the expenditure of large sums, it would be tantamount to transferring *pro tanto* the direction over the receiver, in the expenditure of such funds, now in the court's hands, to your own.

I do not think the assumption of jurisdiction by the commission could have any operation or effect to deny the court the right of control over its receiver; moreover the court has full authority to punish any interference with its supervision and control over its officer should it see fit to exercise it.

I am of the opinion that the proper procedure to be followed by your Commission would be for it to intervene in the equity suit and file a petition praying that the receiver be required to conform to such reasonable regulation as the Commission might impose, and directing him to appear for that purpose before the Commission; but even so your finding or orders would necessarily have to be reported back for confirmation or ratification by the court.

I am advised that Judge Grubb is at this time in New Orleans on the Circuit Court of Appeals, but will return in about ten days. If you desire a petition filed, kindly advise us.

Very respectfully,
RICHARD EVANS,
Assistant Attorney General.

PUBLIC UTILITIES:—Public Service Commission may require receivers to comply with its reasonable orders. Either State or Federal courts may decide as to reasonableness of order.

February 3, 1919.

Alabama Public Service Commission,
Capitol,
City.

Gentlemen:

Since my interview with your President this morning, I am writing you by way of supplement to my letter of the 31st ultimo to amplify and perhaps to clarify the same with reference to a phase of the situation involved in your inquiry.

As said in my letter, the federal statute imposes the duty upon federal receivers to obey the *valid* laws of the State, and of course, you have the right under our statutes to cite a federal receiver, and furthermore to enforce obedience to your orders subject, however, to this limitation that orders of your commission are required to be reasonable, and whether they are reasonable or not is a court question and a matter for judicial inquiry. It would be entirely proper for the federal court to pass upon the reasonableness, and hence the validity of your orders, equally with the State court having co-ordinate jurisdiction in such matters. If the State court had previously passed upon any State law, the federal court would feel constrained to adopt the interpretation of the State court by comity.

I might also say it is my opinion that a mere order regulating the service to be rendered by the receiver would in no wise interfere with the property in the hands of the court, or the custody or control of the receiver over it—which is exclusively the province of the court.

But as attempted to be pointed out in my letter, conditions might arise from an order of your Commission, whereby in order to comply with the terms of your order, it would require such an expenditure that, in the present state of the company's finances, the court might be of the opinion that your order was "unreasonable;" in other words, that the reasonableness or unreasonableness of an order is always a relative question, and while an order with reference to the service of a public service corporation might not directly interfere with the properties in the

hands of the receiver, yet under some circumstances, it might be said that the order to expend large sums of money in order to comply, would in effect be tantamount to a direction over the fund or properties in the hands of the court, the administration of which is its exclusive function.

Of course, you can invoke the jurisdiction of State courts to enforce obedience to your orders, but this would involve at once a clash between federal and State authority, which is always a very delicate question.

Our Supreme Court in the case of *Railroad Commission v. A. G. S. R. R.*, 185 Ala. p. 354, passed upon a somewhat similar situation, and at first blush that case would seem to be controlling of the situation, but as I understand the holding of that case, it provides that federal receiver must obey all valid laws of the State, subject to the limitation that such obedience should not interfere with the custody or control of the receiver over the properties being administered by the court, and takes no property out of their hands. It should be pointed out, however, that section 3 of the federal act cited in this opinion expressly provides that all suits against federal receivers "shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed so far as the same shall be necessary to the ends of justice." (4th Federal Statutes Annotated, p. 387, sec. 3.)

To summarize, I think this Commission has the power and authority to cite a federal receiver to appear before it and to make an order with reference to the service of a public service corporation, and that such order is enforceable (your orders are *prima facie* presumed to be valid), but as pointed out in my letter, I do not think any court, federal or State, where the matter comes up, could be deprived of the right of judicial inquiry as to the reasonableness and hence the validity of your order. This is essentially a judicial question, and open alike to federal or State authority.

Very respectfully,
RICHARD EVANS,
Assistant Attorney General.

EXTRADITION:—Application of the Governor of Oklahoma for the extradition of Virgil Kittrell is in due form.

Hon. Thos. E. Kilby,
Governor of Alabama,
State Capitol, City.

February 3, 1919.

Dear Sir:

I beg to acknowledge receipt of your favor of February 3, submitting papers for the extradition of Virgil Kittrell to the State of Oklahoma, which papers I am herewith enclosing; and asking my opinion whether you should grant the demand of the executive of that State.

The law pertaining to this subject is found in Section 6940 of the Code of Alabama of 1907, which is as follows:

“Section 6940. Fugitives from Other States Delivered upon Demand of Executive. Any person charged in any state or territory of the United States of treason, felony, or other crime, who shall flee from justice and be found in this state must, on demand of the executive authority of the state or territory from which he fled, be delivered up by the Governor of this state, to be removed to the state or territory having jurisdiction of such crime;

also that the Constitution of the United States provides:

“A person charged in any state with treason, felony or other crime, who will flee from justice and be found in another state, shall, on the demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.” (Article 4, Section 2 Federal Constitution.)

I beg leave to advise that it is your duty to issue your requisition authorizing the prisoner to be removed to the State of Oklahoma, when the papers presented to you show:

- (1) A demand for the prisoner from the executive of the state from which he is alleged to have fled;
- (2) A copy of the indictment found or affidavit made before a magistrate, charging the alleged fugitive with the commission of the crime; and
- (3) Such copy of the indictment or affidavit certified as authentic by the executive of such state.

The demand of the Governor of Oklahoma contains a copy of the affidavit properly authenticated, charging the alleged fugitive from justice with the crime of murder, also a copy of the affidavit, certified as authentic by the executive of such state. The requirements of law seem to have been entirely met in the papers submitted for the return of this prisoner, and the Governor of Oklahoma requests that Mat Sankey be the person to whom the prisoner should be delivered on behalf of the State of Oklahoma.

I have the honor to advise you, therefore, that the papers submitted to me are in due and regular form, and that the application for requisition should be granted.

Very truly,
J. Q. SMITH,
Attorney General.

SHERIFFS:—Acts 1915, page 862, last clause fixes fees for sheriffs in county courts.

February 4, 1919.

Hon. M. McFountain,
Judge of Probate, Monroe County,
Monroeville, Ala.

Dear Sir:

I beg to acknowledge receipt of your two letters of January 31, 1919, with reference to Sheriff fees in criminal cases in county courts.

I have examined the Local Acts of the Legislature of 1907, 1911 and 1915, and I have read Chapter 198 of the Code of Alabama, pertaining to county courts, and I am of the opinion that the Acts of 1915, page 862, puts back into effect Chapter 198 of the Code with reference to county courts, and makes some additions thereto.

In reading the Act as a whole, I am of the opinion that the last clause of said Act fixes the fees for the services of the Sheriff the same as provided by law for similar services in the Circuit Court to be taxed as costs in each case, and I am of the opinion that all laws and parts of laws in conflict with this Act are repealed.

Very truly,
J. Q. SMITH,
Attorney General.

OFFICE HOLDERS:—Deputy solicitors are not commissioned.

Hon. William P. Cobb,
Secretary of State,
State Capitol, City.

Dear Sir :

I beg to acknowledge receipt of your letter of February 4, 1919, in which you ask the advice of this office as to whether you are authorized or required to issue commission to "Deputy Solicitors."

In answer thereto I beg to advise that under Section 1469 of the Code of Alabama of 1907 there is no provision for you issuing a commission to Deputy Solicitors, and under an Act of the Legislature of 1915, page 817, providing for the appointment of Deputy or County Solicitors, there is no provision by which they are to be commissioned.

Under this Act the appointments of Deputy Solicitors are made by the Circuit Solicitors, and in my opinion, a certificate or commission issued by the Solicitor is all that is necessary to constitute their appointment.

Very truly,
J. Q. SMITH,
Attorney General.

HEALTH DEPARTMENT:—Validity of election of county health officer by Mobile Medical Society in December, 1918; non-payment of dues forfeited membership of eleven members, though the Society attempted to retain them by resolution, without amending the Constitution.

Dr. W. S. Welch,
State Health Officer,
State Capitol, City.

Dear Sir :

I beg leave to acknowledge receipt of your letter of February 5, submitting therewith a copy of the Minutes of the Mobile Medical Society, held in Mobile, Alabama on December 28, 1918; also a statement of the facts, signed by W. W. Scales, Secretary of said Society, with reference to the election of Dr. C. A. Mohr as County Health Officer for Mobile County, and in which you request this office to render you an opinion as to whether or not Dr. Mohr was

legally elected health officer for Mobile County by said Society.

The facts in the case, as I see them, from the papers above referred to, are as follows:

On December 28, 1918, the Medical Society of Mobile held an election for an all-time Health Officer of Mobile County, as provided for in Section 706, Subdivision 2 of the Code of Alabama, 1907. The members of the Society having had not less than ten, nor more than fifteen days' notice of said election, as required by the law. The membership of the Mobile Medical Society is composed of sixty-one members. It seems that eleven members of said Society are on duty in the United States Army, and that they failed to pay their annual dues as provided in Section 12, Article 2 of the Constitution of said Society, which is as follows:

"Article 62. The annual dues of members shall be receivable on the first day of January of each year, but any member who fails to pay his dues by the first regular meeting in March shall be declared delinquent, and his name shall be stricken from the roll."

The Minutes of said meeting of the Mobile Medical Society sets out that thirty members were present and voting. We are, therefore, confronted with the question whether or not these eleven members, who are in the United States Army, were on December 28, 1918, date of the election, duly qualified members of the Mobile Medical Society. Considering this matter carefully, it is my opinion that when these members failed to pay their dues, provided for in Section 12, Article 62 of the Constitution of the Society, by the first meeting in March, 1918, they were delinquent, and their names should have been stricken from the roll of the said Society.

I find further that on February 2, 1918, the said Medical Society passed the following resolution:

"That all members of the Medical Society of Mobile County who have been called into the service of our Country be retained as members in good standing without payment of dues for the time of their services, and until discharged by the Army."

This resolution was no doubt passed in good faith by the Medical Society of Mobile County, and they no doubt

thought and intended by said Resolution that they were keeping in good standing their members who were absent in the Army; but to effect their purpose and intent a mere Resolution was not sufficient, but would have to be an amendment to the Constitution governing the matter of the qualifications of its members.

You will note in Section 17, Article 83 that a proposed amendment to the Constitution shall be submitted in writing and read, and shall, without discussion, be referred to the board of censors, when the board of censors renders its reports, which it shall do at a regular meeting, and the proposed amendment shall require two-thirds votes of the members present for its adoption, the votes being taken "yeas" and "nays."

Therefore, in my opinion, the Resolution does not amend the Constitution with reference to the payment of dues, and declaring delinquent members stricken from the roll. Therefore, the eleven members now in the United States Army, who did not pay their dues in conformity with the Constitution, are not now, or were not on December 28, 1918, members of the Mobile Medical Society.

I am, therefore, of the opinion, and so advise you, that according to the facts submitted to me, Dr. Mohr was duly elected health officer by the Mobile Medical Society, and I find that membership of the Mobile Medical Society consisted of fifty members, thirty members were present at the meeting which is more than a majority. Dr. Mohr received seventeen votes, Dr. Oates received thirteen; Dr. Mohr being declared duly and legally elected.

Respectfully submitted,

J. Q. SMITH,
Attorney General.

PRINTING:—A bill applicable to counties having population between certain limits should be printed as a general act.

Hon. William P. Cobb,
Secretary of State,
Capitol.

February 6, 1919.

My dear Sir:

I am herewith replying to your communication of the 6th inst., in which you asked to be advised whether House

bill No. 28, should be published under Section 1660 of the Code.

I beg to advise that said act by its terms is applicable to all counties having a population of 82,000 and not more than 100,000, thus making it a general law applicable to all counties that now have such population, or as may have in the future. The pronouncement of our Supreme Court in *Covington v. Thompson*, 142 Ala. 98, would seem to be controlling of the situation, and under the authority of that case, I am of the opinion that the act in question is a general act, having a present or potential sphere of operation throughout the State, and consequently the act referred to by you should be published.

Very truly yours,

J. Q. SMITH,
Attorney General.

CONVICT SYSTEM: OFFICE HOLDERS:—Term of office of President of Board of Convict Inspectors ends March 1, 1919.

February 10, 1919.

Hon. Thos. E. Kilby,
Governor of Alabama,
State Capitol, City.

Dear Sir:

I beg leave to acknowledge receipt of your letter, in which you desire to be advised when the term of the President of the Convict Board expires.

The Convict Board is provided for in Section 6479 of the Code of Alabama, 1907.

“Board of Inspectors of Convicts: Term of Office.—There shall be appointed by the Governor a President of the Board of Inspectors and two other Inspectors of Convicts, one of whom shall be a physician, who together shall constitute the Board of Inspectors of Convicts, and shall have general supervision and control over the State and county convicts. The term of office of the Inspectors shall be for two years and until their successors are qualified.”

The original Act creating the Board of Convict Inspectors was passed by the Legislature on February 18, 1895,

and the first appointment of the President of said Board was made on March 1, 1895, and every two years thereafter.

The term of the President of the Board of Convict Inspectors applies to the office and not to the person, and it ends with the expiration of each period of two years, regardless of the time the officer commenced service on the term to which he was appointed.

I am, therefore, of the opinion and so advise, that the term of the present President of the Board of Convict Inspectors ends on March 1, 1919.

Very truly,
J. Q. SMITH,
Attorney General.

BANKS:—Payment made and received by mistake may be applied to amount due for following year.

February 11, 1919.

Hon. R. L. Bradley,
State Treasurer,
Capitol, City.

My dear Sir:

I am replying to your communication of the 8th instant in which you ask to be advised upon the following facts:

Pursuant to section 5, Acts of 1915, p. 92, upon call of the Superintendent of Banks the Farmers & Merchants Bank of Kinston paid into the State Treasury \$25.00 on March 6, 1918; thereafter on November 29, 1918, this bank made another payment of \$25.00, misconstruing a call from the Superintendent for a report, thereby making a payment of \$50.00 where the statute requires an annual payment of only \$25.00.

Can the extra \$25.00 be applied to the call for the year 1919?

The second payment was irregular and should not have been received; having been received and gone into the State Treasury, it could only be paid out upon warrant drawn according to the law.

As I understand you do not propose to pay out or refund but to apply to the new year. It may be that under some

circumstances the giving of credit on one's books would be tantamount to paying out—and that without a warrant—but I do not apprehend such a condition to arise here.

All that is sought to be done here is to keep your account straight, giving credit where credit is due. It would be an anomalous and grotesque construction that would hold the keeping of correct books to be the equivalent of paying out money without warrant.

I am of the opinion that you may mark your lists paid. It might be well and advisable for the purpose of your files to have the Superintendent of Banks to address your office a letter setting out the facts.

Very respectfully,
L. E. BROWN,
Assistant Attorney General.

PROBATE JUDGE:—Commission of $2\frac{1}{2}$ per cent should be deducted before division of funds between State and county or municipality. (Acts 1915, page 493.)

February 11, 1919.

Judge Charles E. McCall,
Chief Examiner of Accounts,
State Capitol, City.

Dear Sir:

In reply to your inquiry of the 11th inst., as to the source of commissions, payable to Probate Judges, under the provisions of an Act of the Legislature of 1915, known as Act Number 469, found on page 493 of the Acts of that year, I beg to advise that in my opinion, it is intended by the statute that the commission be deducted before there is any division or prorating of the sums collected.

In other words, from whatever sum is paid in by any taxpayer under the provision in question, the Judge of Probate shall deduct $2\frac{1}{2}$ per cent as his commission; after the commission is taken out, 40 per cent of what is left is to be paid over by the Judge of Probate to the city, town or county, as the case may be, and the balance or 60 per cent remitted to the State Treasurer.

Very truly,
J. Q. SMITH,
Attorney General.

SCHOOL SYSTEM:—Interpretation of “three days notice.” Charge of truancy cannot be avoided by attending school one day in five and repeating.

February 13, 1919.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

In reply to your inquiry of February 13th, I beg to advise that under section 8 of the compulsory school attendance act of the Legislature of 1915, “three days’ notice” does not mean three school days, but means any three days of the week including Saturday and Sunday.

I also beg to advise that under section 11 of the act in question, the pupil cannot relieve himself of the charge of truancy by attending school one day and missing four, and repeating.

Yours very truly,
J. Q. SMITH,
Attorney General.

ROADS:—Advertisements for competitive bids should be made in name of State Highway Engineer.

February 17, 1919.

Hon. W. S. Keller,
State Highway Engineer,
Capitol, City.

My dear Sir:

I am replying to your communication of the 12th inst., in which you ask to be advised how advertisements inviting bids should be signed pursuant to section 9 of an act entitled an act for the creation of a State Highway Commission, etc., Acts 1911, p. 223, (230); that is to say whether such notice should be signed by you as the State Highway Engineer, or, as was done in a recent case in Dallas County, by the probate judge of that county.

Section 9 of said act appears to be very inartificially drawn, but upon a consideration of the act as a whole, I am of the opinion that it was contemplated that the advertising inviting competitive bidding should be inserted by the

State Highway Engineer. An examination of the opinions rendered by Attorney General W. L. Martin shows that on August 24, 1915, he addressed a communication to you in which he advises you that it was your duty to advertise for bids for work being done in Jackson County, and it appears therefrom that it was his opinion that this duty was incumbent upon you as the State Highway Engineer.

It is true, as set forth in the letter of Judge Vaughan attached to your letter, that there is room for construction as the intent of the statute is not clearly expressed, and that this statute has not been passed upon by the courts; the all important requirement is that competitive public bidding should be had pursuant to an advertisement for the requisite time under the statute, and it might be that any proper advertisement inviting bids would be construed by the courts as a substantial compliance with the requirements, even if nobody signed it, and whether the one or the other is unimportant and directory.

However, I think it would be wise not to speculate on what holding the courts might make, and pursue the course that has uniformly obtained heretofore of inserting the advertisement yourself, as this seems to be the intent gathered from the statute.

Very respectfully,
RICHARD EVANS,
Assistant Attorney General.

BANKS:—The promissory note of a director of a bank, without collateral or surety, may be considered ample security for a loan, in proportion to the pecuniary ability and credit of the maker.

February 18, 1919.

Hon. D. F. Green,
Superintendent of Banks,
Capitol.

Dear Sir:

You have asked me to give you an opinion whether or not a bank is authorized to loan money to one of its directors on a note which has no surety and no collateral. In other words, you desire to know what is meant by the word

"security" in the sense in which it is used in section 10 of the 1915 banking act (Acts of 1915, p. 95), where it reads as follows:

"Nor shall any such loan be made without good *security*; provided, however, if the board of directors of a corporation has delegated the power to pass on loans to a committee the approval of such loans and of the *security* to secure the loan by such committee may be made in lieu of the approval by the board of directors."

In the case of Reagan v. District of Columbia, 41 Appeal Cases, District of Columbia, p. 409, 412, the court was considering an act of Congress making it unlawful to engage in the business of loaning money on security at more than 6% interest without obtaining a license. In that case a promissory note given by the borrower to the lender was held to be a "security" within the meaning of the act of Congress.

Mr. Justice Van Orsdel in delivering the opinion of the court said:

"In special statutes of this sort, where a peculiar remedy is sought or a wrong is to be restrained, the word 'security' has been applied in its broad sense to include a promissory note.

"The present act, however, specially defines the securities included within its terms as 'any security of any kind, direct or collateral, tangible or intangible, without stopping to inquire whether the term "intangible" security is broad enough to include every evidence of debt we have no doubt of its including any evidence of debt executed by a debtor which will make the payment of money more assured or more easily enforced. We find no difficulty, therefore, in including a promissory note within this general classification."

In the case of Taylor & Co. v. Pickett, 52 Iowa, p. 467, in considering a statute which made securities given in part for intoxicating liquors sold in violation of the law void, the writer of the opinion said:

"The word security is frequently applied in legal parlance to a bill of exchange, or a note, which is the mere evidence of a debt, and that is the sense in which we think it is employed in this section."

In the case of *Wagner v. Scherer*, 85 New York Supplement, 894, where the court was considering a statutory provision to the effect that all securities given for liquor debts were void, in the opinion it is said:

"In the second place, such a promissory note is a security 'given for such debt,' within the meaning of the statute, and therefore void. In popular acceptance the term 'securities' includes promissory notes. Anderson's Dictionary of Law, p. 931. 'Promissory notes, among our people, are regarded as securities for money, more or less valuable; indeed, in proportion as the pecuniary ability and credit of the makers of them, are more or less reliable.' *Jennings v. Davis* 31 Conn. 134, 140. Under the charter of a bank empowering it to 'purchase securities of every kind' it has been held that the term 'securities' as therein used meant notes, bills of exchange, and bonds; in other words, evidences of debt, promises to pay money. *Bank of Commerce v. Hart*, 37 Neb. 197, 202, 55 N. W. 631, 29 L. R. A. 780, 40 Am. St. Rep. 479. But the term 'securities' embraces promissory notes not only in a popular sense, but in a legal sense as well. This was expressly held by Lord Chancellor Sugden in the case of *Barry v. Harding*, 1 Jones & Latouche, 475, 483. I quote from the opinion in that case:

"'Money and securities for money' is the phrase I have to construe. A bill of exchange or promissory note is a security for money in a legal and proper sense of the words; but, were I to hold that an I. O. U. is a security for money, it would involve the subject in much difficulty. Suppose the testator wrote to his debtor for a sum of money due to him, and the debtor in reply admitted the debt would that be a security for money? Or if the testator had written to one of his debtors, 'Send me a security or I will proceed against you,' would he have been satisfied with an I. O. U. in return? There is a sound distinction between

an I. O. U. which is an acknowledgment of a debt and an instrument given to secure the re-payment of a sum of money.

In the case of *Stickel v. Atwood*, 25 R. I., 456, 461, it is said:

"The argument is that 'security' is a general word, including liens by mortgage or pledge, notes, bonds, surety, or anything that guards or protects. This is entirely true in the general application of the word. It is a term used to cover all kinds of evidences of assets. The securities held by a bank, for example, include its bonds and notes."

In the case of the *Bank of Commerce v. Hart* (Neb.) 20th L. R. A. 780, it is said of "securities" as considered in connection with the charter powers of a bank and with special reference to the phrase to purchase "securities of any kind:"

"Securities as here used mean bills of exchange, bonds; in other words, evidences of debt, promises to pay money."

From a consideration of the foregoing, it will be seen that where the statute says that loans shall not be made "without good security," and that the directors or committee of directors shall approve the "security" of loans, but goes no further, there is nothing in the statute to require those charged with the administration of the banking laws to hold that notes are not good security except where there are sureties or collateral; in other words, promissory notes should be regarded as good security for loans in proportion as the pecuniary ability and credit of the maker of them are more or less reliable, irrespective of whether they have collateral or personal sureties.

Very truly yours,
L. E. BROWN,
Assistant Attorney General.

PRINTING AND DISTRIBUTION:—Copies of Code that become too worn from use may be replaced on proper affidavit furnished the Secretary of State.

February 19, 1919.

Judge John MacQueen,
Room 401 Court House,
Birmingham, Ala.

Dear Judge:

I beg to acknowledge receipt of your letter of February 14, with reference to the matter of obtaining three volumes of the Code of Alabama of 1907 for your court, and in answer thereto I would suggest that you make application to the Secretary of the State, setting out that you desire these Codes, and that you make proper affidavit that the Codes originally issued to your court have been destroyed without fault on the part of yourself as present incumbent or your predecessor in office. Where copies have been so worn by constant use as to become useless, it seems to me that this would amount to the same thing as being destroyed.

This matter is covered in Section 588 of the Code. When the proof is made under this Section and the Codes are on hand with the Secretary of State, I will advise that he issue same to you.

With best regards, I am,

Yours truly,
J. Q. SMITH,
Attorney General.

COUNTY COMMISSIONERS:—Tick eradication laws must be carried out by County Commissioners Court as far as possible. But Commissioners cannot be held liable where county has no funds and cannot levy additional taxes.

February 21, 1919.

Hon. L. H. Reynolds,
Judge of Probate,
Clanton, Ala.

Dear Sir:

In reply to your inquiry of February 18, 1919, I beg to advise that it is the duty of the Commissioners' Court of

Chilton County to carry out the provisions of the new State tick eradication law as far as is within its powers.

Of course, it cannot disregard the Constitutional inhibition against levying taxes and after having levied the maximum taxes permitted by the Constitution, it must respect its existing contracts and give priority to claims against it as required by law. If, after it had done these things, there are no funds with which to carry on the tick eradication, the fault will not be the court's. And it follows that, under such circumstances, the members of the court would not be liable under the criminal provisions of the tick law.

Yours truly,
J. Q. SMITH,
Attorney General.

OFFICE HOLDERS: HEALTH DEPARTMENT:—County physician and county health officer are not State officers and same person may fill both offices.

February 24, 1919.

Dr. S. W. Welch,
State Health Officer,
State Capitol, City.

Dear Sir:

I beg leave to acknowledge receipt of your letter of February 20, and a letter enclosed from Hon. Oliver Miles, Clerk of the Board of Revenue of Shelby County, in which you request this Department to advise you whether or not Dr. Joel Chandler, now county physician of Shelby County, can hold the office of county health officer along with the present office of county physician, he having recently been elected as county health officer by the Shelby County Medical Association.

Section 703, paragraph g. of the Code of Alabama of 1907, is as follows:

“703. Duties, Authorities, and Powers of County Board of Health. (g) To elect physicians to attend the inmates of the county poor house and jail, and to fix the terms of office of such physicians, provided that both of said positions may be filled by the same phy-

sician, or by the county health officer. The court of county commissioners or boards of revenue shall fix fair salaries for such physicians as may be elected to fill said positions, or for the county health officer, should he be elected to fill them or any one of them."

The above section seems to provide that the offices of county physician and county health officer can be held by the same physician, and it seems to be the clear intent of the Legislature that the offices of county physician and county health officer may be held by the same physician.

Section 280 of the Constitution, which is as follows:

"Sec. 280. No person holding an office of profit under the United States, except post masters, whose annual salaries do not exceed two hundred dollars, shall during his continuance in such office hold any office of profit under this State; nor, unless otherwise provided in this Constitution, shall any person hold two offices of profit at one and the same time under this State, except Justices of the Peace, Constables, Notaries Public, and Commissioners of Deeds."

has no application to the office of county physician and county health officer, neither of them being officers of the State, under the meaning of this Section of the Constitution. Hence there is no inhibition against their holding two offices, such as county health officer and county physician.

State v. Sanders. 187 Ala. 79;
Harrington v. State. 76 South, 422.

I am of the opinion, and so advise, that Dr. Joel Chandler may legally hold the office of county physician and the office of county health officer of Shelby County at the same time, being a mere employee of the Board of Revenue and the County Medical Society.

Very truly,
J. Q. SMITH,
Attorney General.

DEPARTMENTAL EXPENSE:—Traveling expense accounts on and after February 17, 1919, must be made out as required by act approved that day.

February 25, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

Your communication of the 24th instant, asking to be advised as to when the act approved February 17, 1919, entitled an act to require State officers and employees traveling at the expense of the State to file a verified itemized statement of expenses with vouchers, etc. (Acts 1919, p. 145) has been received. I beg to advise as follows:

Acts (other than penal acts) take effect from the date of their approval unless some other time is specified in the act. Nor does the law take into consideration a fraction or part of a day, consequently the act of February 17, 1919, is operative and effective on and inclusive of February 17.

The act in question cannot be said to be a penal act requiring postponement as to the time of taking effect. Penal acts are those inflicting penalties or forfeitures by way of punishment; in the act in question no penalty is inflicted, it is prohibitory rather than punitive; it does not work a forfeiture to the employee who fails to properly present his account itemized and supported by vouchers. It merely postpones the day of payment and prohibits the Auditor from honoring such account until it is made out according to statutory requirements, i. e., it must be itemized and verified and supported by vouchers where the amount is fifty cents or more.

I, therefore, have the honor to advise you that the act in question went into operation and effect on and inclusive of February 17, 1919, and all vouchers drawn on that day or subsequent thereto are within the influence and operation of that statute and must be made out in accordance with the requirements thereof.

Respectfully,

J. Q. SMITH,
Attorney General.

DEPARTMENTAL EXPENSE: INSURANCE DEPARTMENT:—

Act of February 17, 1919, does not apply to traveling expenses of actuary of Insurance Department, as such expenses are charged to the insurance companies and not the State.

February 25, 1919.

Hon. C. B. Smith,
Commissioner of Insurance,
State Capitol, City.

My dear Sir:

Your communication of the 24th inst., received, asking whether the recent Act, approved February 17, 1919, requiring State officers and employees to turn in a verified itemized statement of expenses with voucher when above fifty cents (Acts 1919, p. 145) is applicable to the Actuary employed in your Department, I beg to reply as follows:

The Act, approved February 17, 1919, requires the verified statement with vouchers attached in the case of all State officers and employees *traveling at the expense of the State*. By the terms of Section 11, Acts 1915, page 837, the provisions governing the expense account of your Auditor are set forth as follows:

“Hotel bills and traveling expenses actually incurred in connection with such examination shall upon proper vouchers therefor be paid by the State on condition that the same shall have previously been charged to such insurance company and by it paid to the Insurance Department.”

It would, therefore, appear that the bills of your Actuary for traveling expenses and hotel bills, when paid in accordance with this Section on a proper certification is not *traveling at the expense of the State*. Therefore, I do not think the Act of February 17, 1919, is applicable and controlling in the matter of accounts of your Actuary.

Very respectfully,

J. Q. SMITH,
Attorney General.

PROHIBITION LAWS:—Vehicles may be condemned even though the owner did not know to what use they were being put by the persons to whom they were loaned.

February 26, 1919.

Hon. J. Kyle Young,
Sheriff Tallapoosa County,
Dadeville, Ala.

Dear Sir:

Your inquiry of February 24th addressed to this office desiring to be advised whether or not you can seize a mule and buggy used in unlawfully transporting liquor in the absence of evidence that the owner thereof knew of the use to which it was put, I beg to advise you that it is not material whether or not the owner knew or had notice of the use to which the vehicle was being put; that is to say, it is not essential in such cases that the owner should have notice that the parties to whom he loaned his vehicle were going to haul liquors therein. If the owner of a vehicle voluntarily allows another to assume possession of it for any purpose, and that person while in such possession hauls liquor with such vehicle, the same is subject to forfeiture under the terms of the act of the Legislature approved January 25, 1919 (Acts 1919, p. 6). To make the distinction clear, I advise you that if a person stole a vehicle from the owner and while in such wrongful possession thereof uses the same to haul liquor, the vehicle could not be condemned under the law above referred to, but if the owner makes a loan of the same to a person, even though the understanding between them be that the vehicle shall be used for a lawful purpose, and in fact the person in possession without knowledge or consent of the owner uses the vehicle for the unlawful purpose indicated, then the vehicle is subject to seizure and forfeiture.

This office is now engaged in preparing a brief on this question which will be used on the trial of the cases in Birmingham and we will be glad to furnish you or your solicitor or the attorneys representing you any information which may be desired.

Very truly yours,
HORACE C. WILKINSON,
Assistant Attorney General.

DEPARTMENTAL EXPENSE:—Act of February 17, 1919, as to traveling expense accounts, applies only to officers and employees whose expenses are paid by warrant of the State Auditor on the State Treasurer; therefore it does not apply to Commissioner of Agriculture and his employees, nor to examiners of accounts.

February 26, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

Referring to your inquiry as to the application of an act approved February 17, 1919, to require State officers and employees traveling at the expense of the State to file vouchers, etc. (Acts 1919, p. 145), (1) to payments made under section 52 of the Political Code for the expenses of the Department of Agriculture and Industries and (2) to Examiners of Accounts, who under an act approved April 18, 1911 (Acts of 1911, p. 490) receive for their services compensation "payable monthly, and an additional sum, computed on a monthly basis of \$4.00 per day for expenses, and in addition thereto all transportation expenses incurred in going and returning in filling assignments and going from and returning to their homes." I beg to advise that it is my opinion that the act approved February 17, 1919, applies only to officers and employees of the State where traveling expenses are paid by warrant of the State Auditor drawn on the State Treasurer.

Under section 52 of the Political Code the traveling expenses of the Commissioner of Agriculture and his employees are not paid upon warrants drawn by the Auditor on the State Treasurer for the use of the Department of Agriculture in paying traveling and other expenses, so that the Act of February 17, 1919, is inapplicable to traveling expenses paid under the provision in question.

And with reference to the Examiners of Accounts it seems that the law does not provide a specific allowance for traveling expenses, but allows them (a) \$4.00 per day for expenses computed on a monthly basis and (b) transportation expenses, so that I am of the opinion that the Examiners of Accounts are not required to follow the requirements of the Act of February 17, 1919, with reference to the expense allowance of \$4.00 per day, but are required

to respect said act with reference to transportation expenses.

Very truly yours,
J. Q. SMITH,
Attorney General.

COUNTY EXPENSES:—Adding machine may be furnished county tax assessor at expense of county on approval of county commissioners court.

February 27, 1919.

Mr. E. D. Laurendine,
Tax Assessor, Mobile County,
Mobile, Ala.

Dear Sir:

Replying to your inquiry of February 25, as to whether or not you are entitled to be furnished with an adding machine at the expense of the county, I beg to advise that the authority under which the books and stationery of your office are furnished is Section 2359 of the Code, which reads as follows:

“The tax collector and tax assessor are authorized to purchase necessary books and stationery, and to contract for the necessary printing in their respective offices, with the approval of the Court of County Commissioners.”

The word “stationery” used in this construction is generally construed in this State to embrace all writing materials and implements, which would include typewriters and adding machines.

Crook v. Commissioners Court, 144 Ala. 505;
Opinion of Attorney General Brickell, found on page 220 of his Biennial Report for 1910-12.

You will note the approval of the Court of County Commissioners is necessary for the purchase of these supplies.

Very truly,
J. Q. SMITH,
Attorney General.

SCHOOL SYSTEM:—County Board of Education may employ attendance officers and fix their compensation, under Acts 1915, page 538, section 12.

February 28, 1919.

Hon. Spright Dowell,
Superintendent of Education,
State Capitol, City.

Dear Sir:

In reply to your inquiry of this date, whether County Boards of Education have authority to fix the compensation of school attendance officers under the provision of Section 12 of the school attendance act (page 538, Acts 1915), I will say that I am of the opinion that where the attendance officers are employed by the County Boards of Education, it is the duty of such Boards to fix their compensation subject to the limitation stated in the Act.

Yours very truly,

J. Q. SMITH,
Attorney General.

COUNTY COMMISSIONERS:—Counties may borrow money for tick eradication under Acts 1915, page 105.

March 3, 1919.

Judge Frank C. Turner,
Chatom, Alabama.

Dear Sir:

I beg to acknowledge receipt of your letter of February 28, with reference to your Commissioners Court borrowing money for the purpose of complying with the law with reference to tick eradication in your county.

You are right in your statement that the County Solicitor is the proper person to advise you on these matters, and I will state for your information that by a careful reading of an Act of the Legislature of 1915, page 105, you will find that your county can borrow money in accordance with the provisions of that act, and it does not restrict your board as to how such money shall be expended, and I take it that the board can spend it for general purposes as allowed by law.

If you should decide to issue certificates covering a temporary loan, the parties who will furnish the money will

no doubt look into your authority before they lend you the money asked for.

Very truly,
J. Q. SMITH,
Attorney General.

DEPARTMENTAL EXPENSE: HIGHWAY DEPARTMENT:—Acts 1911, page 223, section 5, is not affected by act approved February 15, 1919. The fact that the Governor's approval is required does not convert appropriation from absolute to contingent.

March 3, 1919.

Hon. W. S. Keller,
State Highway Engineer,
State Capitol, City.

Dear Sir:

Replying to your communication of this date, in which you asked to be advised whether the recent act approved February 15, 1919, entitled "An Act to revoke conditional and contingent appropriations," etc., (Acts 1919, p. 103) affects the appropriation carried in Section 5 of an Act to provide for the creation of a State Highway Commission, etc. (Acts 1915, page 223), I beg to advise:

The recent Act of February 15, 1919 is only aimed at and affects *conditional* and *contingent* appropriations: it does not affect nor is intended to disturb absolute and unconditional appropriations. The appropriation of one hundred and fifty-four thousand dollars per annum, carried in Section 5 of this Act, approved April 5, 1911 (Acts 1911, page 223) is absolute and unconditional, and hence, unaffected by the provisions of said act approved February 15, 1919.

In regard to the second question in your letter, to-wit, whether the provision in said Section 5 Acts 1911, p. 223, requiring the Governor's approval of the annual expenses of the Highway Department converts such annual expenses into a conditional or contingent appropriation, I must likewise reply in the negative.

As said above, the appropriation is absolute and unconditional, and the annual expense of the Department defrayed out of this fixed appropriation cannot and does not

change the character of the appropriation. The provision requiring the approval of the expense account is intended merely as a check and safeguard against extravagance.

Respectfully,

J. Q. SMITH,
Attorney General.

PRINTING AND DISTRIBUTION:—Senate Joint Resolution 66 of Legislature of 1919 amends Acts 1915, page 159; Secretary of State required to print 2,000 copies of Acts of the Legislature.

March 4, 1919.

Hon. W. P. Cobb,
Secretary of State,
State Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of March 2, in which you request an opinion from this office as to the number of copies of the General Acts of the recent session of the Legislature which should be printed and distributed by your office.

I beg to advise that Senate Joint Resolution 66 (Acts 1919, p. 168) provides for the printing and distribution of two thousand copies of the General Acts, and that you should send to the Probate Judge of each county ten copies thereof; one copy to each member of the Senate and House of Representatives; one to each of the Solicitors and Judges of this State; one to each Department of Government, and the remainder to be distributed to the general public upon request.

It is my opinion, and I so advise you, that this Senate Joint Resolution amends the Act of the Legislature of 1915, page 159, which provides for twelve hundred and fifty (1250) copies, and raises the number to two thousand (2000).

Very truly,

J. Q. SMITH,
Attorney General.

HEALTH LAWS:—Act approved February 19, 1919, providing for ante-nuptial examination of men, is penal statute, and goes into effect sixty days after approval.

March 4, 1919.

Hon. W. P. Cobb,
Secretary of State,
State Capitol.

Dear Sir:

I beg leave to acknowledge receipt of your letter, asking the advice of this Department as to when House Bill No. 105 (Acts 1919, p. 169) goes into effect. This bill provides for the control of venereal diseases by ante-nuptial physical examination of men, which shall be done within fifteen days before granting marriage license, and fixing penalties for non-compliance.

This bill was signed by the Governor on February 19, 1919, and is a penal statute, and it is my opinion, and I so advise you, that it goes into effect sixty days from the time it was approved by the Governor, as provided in said Section 7805 of the Code of Alabama, 1907.

Very truly,
J. Q. SMITH,
Attorney General.

BUDGET ACT:—Act approved February 11, 1919, does not affect particular funds collected for a special purpose.

March 5, 1919.

Hon. C. B. Smith,
Commissioner of Insurance,
Capitol, City.

Dear Sir:

Replying to your communication of the 4th inst., asking to be advised whether the act approved Feb. 11, 1919, entitled "An act to better secure the administration of the financial affairs of the State in respect to expenditures and appropriations," etc., (Acts 1919, p. 33) commonly referred to as the Budget Act, affects the fund created by Sec. 5, Acts 1909, p. 321 (325) for investigating the causes of fires, etc.; I beg to advise:

The purpose and design of the Budget Act is to adjust legislative appropriations to the demands and revenue of the State and to provide the Budget Commission with intelligent data for its guidance in making proper recommendations. Where a particular fund is collected from fire insurance companies to be devoted to a particular purpose, e. g., the investigation of fires, etc., I do not think that such a fund is affected by the Budget Act.

If this were not true, the particular fund collected out of the fire insurance companies for a particular purpose, might fail of its purpose and be devoted to other causes, thus falling into the general fund and defeating the special object for which it was created.

I am of the opinion that section 5 of acts 1909, p. 321 (325) is not affected by the Budget Act, nor was it intended that said act should disturb or deflect particular funds collected for a special purpose.

Respectfully,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS:—Assistant Adjutant General may act also as State Disbursing Officer; office of Adjutant General not an office of profit under the State, within the meaning of section 280 of the Constitution.

March 6, 1919.

Major Hartley A. Moon,
Acting Adjutant General,
State Capitol, City.

Dear Sir:

Your favor of March 5, addressed to this office, desiring to be advised as to whether or not one person could act as Assistant Adjutant General, and State Disbursing Officer, and draw the salaries provided by law for each place, has been received, and in reply thereto I beg to advise you that in my opinion one man might be appointed to fill both places and draw the salary provided by law for each place.

Section 3 of the Act enclosed expressly provides that the Assistant Adjutant General "shall be a chief clerk and assistant to the Adjutant General." In my opinion a chief

clerk is not an office of profit under the State, within the meaning of Section 280 of the Constitution.

Yours very truly,
HORACE C. WILKINSON,
Assistant Attorney General.

COUNTY BONDS:—County interest-bearing warrants exempt from taxation.

March 8, 1919.

The State Board of Equalization,
State Capitol,
City.

Gentlemen:

I have your inquiry of March 3, relative to the collection of taxes on interest bearing county warrants.

In this connection I beg to advise that I am of the opinion that former Attorney General Tate was in error in holding in his letter to you of February 22, 1918, that interest bearing warrants issued by counties to cover cost of road construction or as security for money loaned such counties, are not exempt from taxation.

Attorney General Tate seems to have based his conclusion upon the holding in the case of *Matkin v. Marengo County*, 137 Ala. 155, and other cases, to the effect that such county warrants are not county bonds within the contemplation of Section 222 of the Constitution of Alabama. That such warrants are not county bonds is, of course, true. The long line of decisions of the Supreme Court of Alabama so holding makes that conclusion beyond question, so far as this State is concerned, but it does not follow that, because county warrants are not county bonds, they are taxable.

The Legislature of 1915 (Acts 1915, p. 107), "specifically exempted from taxation in this State money loaned, solvent credits and credits of value, other than such as are secured by mortgage, deed of trust, or a contract of conditional sale, upon which a privilege tax is required to be paid." As said in the case of *Savage v. Matthews*, 98 Ala. 535-537, "it—a county warrant—is nothing more really than an order on the county itself, the debtor;" and in the case of

Hagan v. Commissioners' Court, 160 Ala. 544, 563, referring to a contract for the erection of a courthouse, in pursuance of which county interest bearing warrants were issued, it is said—"our conclusion is that, whatever may be the decision of the courts of other jurisdictions, the contract in question creates an indebtedness." I am of the opinion that under the provisions of the above mentioned Act county warrants are exempt from taxation, as a species of solvent credits, if indeed they would not be exempt from taxation, if this Act of the Legislature exempting solvents credits did not exist.

In view of this Act exempting solvent credits it is unnecessary to take up the other questions which raise doubt as to the legality of taxing such warrants; however, I call attention to them. In the case of City of Huntsville v. Madison County, 166 Ala. 389, the Supreme Court considered the liability of a county for a street improvement assessment tax, holding that the county was not liable for improvement of the streets around the county court house. In the course of the opinion Chief Justice Anderson said:

"Property owned and held by the State and counties for public purposes is generally exempt from taxation of any description, and is not to be deemed subject to taxation in any form, unless the intent of the Legislature to render it so clearly appears. The authority to levy this tax is general, and the statute makes no express provision for the levy of same against State or county property held for public purposes."

And later on in the opinion Chief Justice Anderson says:

"The fact that county property is included in the exemption from general taxation by the terms of Section 2061 of the Code of 1907 is no indication that it was intended to be subject to this special tax. It was exempt regardless of this statute, and was doubtless included in the schedule with other property not necessarily exempt, independent of the statute, and for the purpose of setting forth all exempt property."

It seems to me the same principle that renders property held and owned by the State and counties exempt from tax-

ation would apply to the securities of the State and county, and because the Revenue Act (Acts 1915, p. 386) does not set out county warrants as exempt from taxation, saying simply, "That all bonds of the United States and of this State, and all county and municipal bonds of counties and municipalities of the State are exempt from taxation," it does not follow that county warrants were intended to be taxed. It could hardly be imagined that a State would offer to its citizens the right to borrow money free from the burden of taxation, and at the same time burden its own subdivisions—the tax necessarily enters into the rate of interest or the price paid for the loan.

The question is also raised in your inquiry as to the collection of the tax on these warrants held outside of the State. Of course, as I have held that the warrants are not taxable in any event, it is unnecessary to consider the question of how to reach these warrants for taxation when they are held outside of the State. But this question calls to mind another reason why it was never intended that such warrants should be taxed at all. Among the complex questions under the subject of taxation are: first, the situs for taxation of intangible personal property, such as bonds, notes, credits, etc.; and second, how to collect the tax where an attempt is made to collect it outside of the State of the owner's domicile. As said in the case of *Boyd v. Selma*, 96 Ala. 144, passing on the question whether negotiable promissory notes are taxable at the domicile of the owner, or whether the situs of such property, and not the domicile of the owner, determines the liability to taxation, we find irreconcilable confusion in the adjudicated cases, as well as differences in the statement of the doctrine in the text books. To illustrate the difficulty in collecting taxes on debts or evidences of debt in states other than the domicile of the owner, we call attention to the cases below.

Bristol v. Washington County. 177 U. S. 133.

City of New York v. McLain. 57 Appellate Division, 601.

Buck v. Beach, 206 U. S. 392.

Erie Railroad Company v. Pennsylvania. 153 U. S. 628.

Notwithstanding the great difficulty in collecting taxes on foreign held bonds, the revenue Act in question, under which it is claimed that these securities are taxable, makes no reference to the collection of the taxes where the securities are owned outside of the State, and attempts to make no provision for collecting them in any such instances. This, in my judgment, further tending to show that it was never contemplated that such securities should be taxed.

Very truly,

L. E. BROWN,
Assistant Attorney General.

DEPARTMENTAL EXPENSE:—Traveling expense accounts of circuit judges must be itemized, with vouchers attached, as required by Act approved February 17, 1919.

March 8, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

In reply to your inquiry of the 7th inst., relative to the application of the Act of February 17, 1919 (Acts 1919, p. 145) requiring the filing of itemized statements of expenses with vouchers attached before warrants can issue to State officials and employees; to a Circuit Judge traveling out of his district on public business, I beg to advise that I am of the opinion that the Act is applicable. I think, as held in a letter to you, of date February 26, that the Act in question applies in all cases where traveling expense accounts are paid out of the treasury on the Auditor's warrant. The traveling expenses of Circuit Judges are paid under section 6 of an Act of September 18, 1915, to further define the duties of the Chief Justice, etc., which provides that such accounts shall be paid upon approval of the Chief Justice by warrant of the Auditor.

Yours very truly,

J. Q. SMITH,
Attorney General.

DEPARTMENTAL EXPENSE:—Traveling expense accounts of State Board of Health are not governed by act approved February 17, 1919, because paid from appropriation to State Board of Health

March 8, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

In reply to your letter of the 7th instant, whether the Act of February 17, 1919 (Acts 1919, p. 145) relative to expense accounts, applies to the expenditure of the appropriation to the State Board of Health under Section 733 of the Code as amended (See Acts 1911, p. 621), I beg to advise that in accordance with my former ruling, made in a letter to you of date of February 26, 1919, I am of the opinion that the Act relative to expense accounts is not applicable to the expenditures under the appropriation in question.

Very truly yours,

J. Q. SMITH,
Attorney General.

LICENSES:—Automobiles belonging to the United States Shipping Board, Emergency Fleet Corporation, not subject to State taxation.

March 10, 1919.

Hon. Alex D. Pitts,
U. S. District Attorney,
Mobile, Ala.

Dear Sir:

In reply to your inquiry of March 4, made, as you say, at the suggestion of Mr. J. F. Courtney, Assistant Solicitor for Mobile County, asking the opinion of this office whether or not State license tax is required on automobiles belonging to the United States Shipping Board—Emergency Fleet Corporation.

In reply I beg to advise that, in my opinion, such automobiles are not subject to such tax. While the taxing power of the State is unrestrained by any express Constitu-

tional restrictions, and there is no express exemption of automobiles so owned from the automobile license tax, there is a very general restraint arising out of the necessary relations between the State and the Federal Government. The great volume of the law of Federal restraint upon State taxation has been developed upon the fundamental principle of the supremacy of the Federal authority. While in many statutes government property and securities are expressly exempt from State taxation, the exemption irrespective of the statute follows the relation of the states toward the Federal Government as worked out and recognized by the opinions of the Supreme Court of the United States, following the leadership of Chief Justice John Marshall. In regard to the refund, application therefor should be made to the State Auditor.

Very truly,

L. E. BROWN,
Assistant Attorney General.

BANKS:—No State bank is authorized to increase capital stock without consent of State Superintendent of Banks, nor to do business without capital required by law being paid up in full.

March 11, 1919.

Hon. D. F. Green,
Superintendent of Banks,
Capitol.

Dear Sir:

Replying to your inquiry of the 6th instant, in regard to your duties (1) where a bank under your jurisdiction has increased its capital stock without your authority, (2) where a bank is doing business without the capital required by law paid in, I beg to advise that under the provision of Section 12 of the 1915 amendment to the banking law (Acts 1915, p. 95) no state bank is authorized to increase, in any way, its capital stock without authority from you. Should the bank, after the matter is called to their attention, persist in failure to correct its action to conform to the banking laws, proceedings by you looking to the vacation of the bank's charter would be justified. The same

thing would be true, if the bank was doing business, never having the amount of capital required by law paid up.

Yours very truly,

L. E. BROWN,
Assistant Attorney General.

SCHOOL LAWS:—Compulsory education requirements may be complied with by educating a child at home, if the instruction given is in good faith and sufficient in extent.

March 12, 1919.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

I have your inquiry of March 11, for an opinion on two kindred questions (1) whether the teaching of a child at home by the parents can be considered as meeting the requirements of the compulsory school attendance law, (2) whether instruction by a governess in the home meets the requirements of the law.

The law requiring children to attend school has not been before the appellate courts of this State, but it is well understood that the natural rights of a parent to the custody and control of his infant child are subordinate to the power of the State, and may be restricted and regulated by law.

One of the most important obligations of a parent is to see that his child is educated. He owes this duty to the State as well as to the child. If he neglects or fails to perform this duty, it is generally held that he may be compelled by law to do so.

The great object of the act in question is that all the children of the State shall be educated, not that they shall be educated in any particular way other than that they may acquire the branches of learning required by law to be taught in the public schools. It is true that the law says that they must attend a school, but any place where instruction is imparted to the young may properly be termed a school.

I am of the opinion that a parent who employs a competent governess in his home or who sends his child to the

home of a competent school teacher, where the child receives instruction in the same branches and for the same period as given in the public schools, complies with the law, though such teacher is not the holder of a teacher's license, and no other pupils are taught.

The purpose of the law being that all children of the State shall be educated, I am further of the opinion that the meaning and spirit of the law has been fully complied with, whenever the person having a child under his control, instead of sending him to a public school has the child instructed for the specified period in the required branches of learning. This permits instruction in those branches by a private tutor or governess or by the parents themselves, provided it is given in good faith and is sufficient in extent.

If the child is not sent to a public school or to school approved by the public school authorities, then the person having control of a child takes the responsibility of being able to prove that the child has been sufficiently and properly instructed. He has no such responsibility if the child is sent to a public or approved school.

Very truly yours,

J. Q. SMITH,
Attorney General.

PROHIBITION LAWS:—Soft drinks may contain trace of alcohol, to cut oil and preserve syrups, but not more than one-half of one per cent.

March 14, 1919.

Hon. Joseph R. Tate,
Solicitor, 10th Judicial Circuit,
Birmingham, Alabama.

Dear Sir:

This office is in receipt of your communication of March 8th, in which you request an official opinion as to whether or not certain manufacturers and dealers in well known soft drinks that are said to contain a mere trace of alcohol in sufficient amount to preserve the syrup and to act as a cutter, are affected by the provisions of paragraph 6 of Section 1, of the Act of the Legislature approved January 25th, 1919, known as House Bill No. 7 (Acts 1919, p. 6), which reads as follows:

"All liquors, liquids, drinks or beverages made in imitation of, or intended as a substitute for beer, ale, rum, gin, whiskey, or for any other alcoholic, spirituous, or malt liquor; and *further that any drink or liquid made or used for beverage purposes containing any alcohol, shall be deemed an alcoholic liquor within the meaning of the term 'prohibited liquors and beverages'* as defined in this Act, in connection with the existing prohibition laws of Alabama."

In reply thereto I beg to advise you as follows: A review of the laws of this State relating to prohibition discloses an earnest effort on the part of the Legislature to suppress not only the possession and disposition of all malt and intoxicating liquors as those terms are commonly understood, but also to suppress the possession or disposition of any kind of a substitute for any such prohibited liquors by whatsoever name the substitute may be called, and without regard to its character as an intoxicant; with this purpose in mind the Legislature saw fit to enact the Section above referred to, which contains the provision to the effect that "any drink or liquor made or used for beverage purposes, containing *any alcohol* shall be deemed alcoholic liquors within the meaning of the terms "prohibited liquors and beverages."

While the word "any" is a very comprehensive term, and taken in one sense is sufficient to include all beverages and liquids that contain the most minute quantity of alcohol, I am not of the opinion that the Legislature used this word in that sense. No one will seriously contend that the Legislature intended to prohibit the sale of the various kinds of well known soft drinks that are not and cannot be held to be substitutes for the prohibited beverages; what the Legislature had in mind was that class of beverages that in a general way, or in some way, resembled the prohibited article, and the sale or possession of which might facilitate the violation of law. In one case, for instance, beverages of that kind are prohibited if malt is a substantial ingredient, without regard to whether they contain alcohol or not. Then again, that class of beverages are prohibited if they contain any alcohol, without regard to whether they contain any malt or not. This, taken in connection with the restrictions thrown around the disposition of jamaica gin-

ger in Section 131½ of said Act sheds light on the intent of the Legislative body.

I, therefore, advise you that a liquid or beverage that does not contain more than one-half of one per cent of alcohol, and that does not in any way, either by the way it is put up, or by sight, taste or smell, resemble the intoxicating beverages enumerated and described in the prohibition laws of the State, and which cannot be used as an aid or means of violating said law, is not, in my opinion, affected by the provision above referred to, and for that reason many well known soft drinks that come within the terms above laid down, are not, in my opinion, comprehended in the terms "any * * * liquid * * * containing any alcohol" even though said beverages contain any insignificant portion or trace of alcohol, provided said portion or trace does not exceed one-half of one per cent as above referred to.

Very truly,

HORACE C. WILKINSON,
Assistant Attorney General.

PROHIBITION LAWS:—Sale of flavoring extracts for culinary purposes is not prohibited.

March 15, 1919.

Hon. Bart B. Chamberlain,
Solicitor, 13th Judicial Circuit,
Mobile, Ala.

Dear Sir:

Your favor of March 10, requesting an official opinion as to whether or not it is a violation of the prohibition laws of Alabama for one to sell and dispose of flavoring extract which contains 80% alcohol, has been referred to the writer for attention, and in reply thereto I beg to advise you as follows:

Assuming that the flavoring extract referred to in your letter is the well known article of merchandise, such as lemon or vanilla extract, and that its legitimate use is for flavoring purposes, the authorities seem to say that its common use is for culinary purposes, and that its formula is

recognized and prescribed in the United States Dispensatory and other standard works, in which it is so classified. *Walker v. Dailey*, 101 Ill. App. 587.

The sale or disposition, therefore, of such extracts for culinary purposes is not prohibited by law. *Humphrey v. State*, 77 So. 82. However, if such extracts are sold for beverage purposes such an act would be unlawful, but it would have to be shown that they were sold with this intent or for such purposes.

Very truly yours,
HORACE C. WILKINSON,
Assistant Attorney General.

PROHIBITION LAWS:—Attempt to make liquors may be prosecuted as a felony, and judge of probate would not have jurisdiction of case.

March 18, 1919.

Hon. Fred Jones,
County Solicitor,
Hamilton, Ala.

Dear Sir:

Your favor of March 14, desiring to be advised with reference to whether or not the parties apprehended in an attempt to make prohibited liquors are guilty of a violation of the law, has been referred to the writer for attention. In reply thereto I beg to advise you that Section 15 of the Shaw bill makes it a felony for any person to distill, make or manufacture any alcoholic, spirituous, malted or mixed liquors or beverages any part of which is alcohol, etc.

Under Section 7315 of the Code, and Section 6311 of the Code the defendants can be convicted of an attempt to commit this felony and punished accordingly. (See *Benbow v. State*, 128 Ala. 1, and *Hutto v. State*, 169 Ala. 19). This would be a prosecution for a felony and the judge of probate would not have jurisdiction in such cases.

Very truly,
HORACE C. WILKINSON,
Assistant Attorney General.

BOARD OF CONTROL AND ECONOMY:—Purchases for Appellate Courts and Supreme Court Library may be made by Board of Control and Economy if requested, but not required to be.

March 18, 1919.

Hon. W. D. Nesbit, Chairman,
State Board of Control and Economy,
State Capitol, City.

Dear Sir:

I beg leave to acknowledge receipt of your letter of March 18, in which you ask this office to advise you whether or not the Justices of the Supreme Court, Clerk of the Supreme Court and the Justices of the Court of Appeals come under the supervision of the State Board of Control and Economy with reference to the purchase of supplies for said Judicial Department of the State.

I beg to advise that under Section 13 of Senate Bill No. 101 (Acts 1919, p. 45), the Supreme Court, the Court of Appeals and the Supreme Court Library are exempt from the supervision of the Board of Control, these courts being specifically excepted in the Act.

I will state for your information that if it is the desire of the Supreme Court, the Court of Appeals and the Supreme Court Librarian, for your board to purchase supplies for them, I see no objection to the Board making said purchases. I am returning herewith the enclosures contained in your letter.

Very truly,
J. Q. SMITH,
Attorney General.

ADJUTANT GENERAL:—No provision for payment of expenses of intermittent residence, unless from Governor's contingent fund.

March 19, 1919.

Hon. Hartley A. Moon,
Acting Adjutant General,
State Capitol, City.

Dear Sir:

Your favor of March 12, desiring to be advised as to whether or not the Acting Adjutant General and the Assistant Acting Adjutant General can be reim-

bursed on a per diem basis by the State for actual expenses that are incurred on account of intermittent residence in the Capitol, incident to the performance of work in the office of the State Adjutant General, has been referred to the writer for consideration, and in reply thereto, I beg to advise you that I find no provision of the law which would authorize a payment under such circumstances, unless the Governor should see fit to pay it from his contingent fund, which I think would be entirely proper for him to do.

The employment of clerical assistance is governed by Section 562 of the Polical Code, and as I see it, there is no way under said Section to authorize the payment of any sum to the two officers named for the performance of the duties above referred to. It is rather unfortunate that a situation of this kind is not covered by some provision of law, other than the provision governing the expenditure of the Governor's contingent fund. However, such is the case, and all are bound by it.

Very truly,
J. Q. SMITH,
Attorney General.

ROADS:—Lowest bidder for construction work may assign contract and new contractor may be substituted with consent of all parties concerned, on the same terms as the original bidder.

March 19, 1919.

Hon. W. S. Keller,
State Highway Engineer,
Capitol, City.

Dear Sir:

Replying to your communication of recent date advising that Messrs. S. H. Brown & Sons, lowest bidder for road construction work in Greene County desired to transfer their bid to one W. M. Thompson with the consent of the County Commissioners, and have the contract awarded to said W. M. Thompson in lieu of said Brown & Sons, lowest bidder; the contract to be, however, at the same figures and same terms of S. H. Brown & Sons' bid, I beg to advise as follows:

As I understand from your letter, it is desired to have Mr. Thompson substitute in lieu of S. H. Brown & Sons,

and have the contract awarded directly to W. M. Thompson, and it is intended thereby to relieve S. H. Brown & Sons from any obligation or liability. If all parties concerned consent to the substitution or novation of parties, I see no reason why the change may not be made.

Public contracts like private ones may be assigned or novated unless restrained and limited by some prohibitive statute, or by the terms specified in the contract itself, unless the character of the obligation be one of a personal nature, such as calling for exceptional personal skill or trust, and I do not think the question of road building falls within that classification. (See Elliot's Roads and Streets, Section 644), and in any event consent of all parties concerned would be sufficient.

Very truly yours,
RICHARD EVANS,
Assistant Attorney General.

SCHOOL LANDS:—Contract for sale of 1,000 acres of land cannot be specifically enforced after failure to secure title in State to sufficient lands, and may be abrogated as to remainder, or new contract made for purchase of other lands not contemplated in first contract. State should account to purchaser for balance of initial payment.

March 20, 1919.

Hon. Spright Dowell,
Superintendent of Education,
State Capitol, City.

Dear Sir:

I have gone through the papers in the matter of the Tennessee Coal, Iron and Railroad Company, which you submitted to me at our conference yesterday, being the contract and correspondence thereto.

This contract undertakes to sell to the T. C. I. Company one thousand (1000) acres of land to be secured from the United States Government; that is to say, the State deemed it was entitled to certain indemnity lands in lieu of 16 section lands, and to this end a former Governor entered into a contract with one, Howard Lamar, to run down and investigate as far as possible the various public lands of the

government available and against which Mr. Lamar was to make "filings" or requests for such lands to be certified to the State of Alabama in lieu of 16 section school lands sold or appropriated, and from which the State had received no benefit.

It will be observed that the State undertook to sell lands that it had no title to, and which it expected and hoped to induce the Government to certify, and while the contract entered into with the T. C. I. Company calls for the sale of approximately one thousand (1000) acres, it recognizes that the State might be unable to secure so large an acreage and be unable on its part to make title to so much land: in other words, unable to carry out its contract. Consequently the following clause was inserted in the contract:

"It is agreed that it may be impracticable for the State to secure the titles from the United States to said lands so affected by homestead claims, in which event the party of the first part (State of Alabama) shall be wholly absolved from any obligation growing out of its failure to secure and convey the titles to the said party of the second part (T. C. I. Co.) of such lands as it may not be able to secure from the United States as herein contemplated."

Since the State did not own the lands expected to be received from the Government, and which it contracted to sell, it could not and did not undertake to sell specific lands, and consequently the contract is most indefinite. It would be impossible, in the nature of things, for a court of equity to decree specific performance of the contract, as there is no specific subject matter upon which a decree could operate. It is stipulated in the contract as follows:

"It is agreed that the party of the second part does not at this time know just which lands it will be able to secure relinquishments to nor which lands it may finally decide that it wishes to have selected for it as herein provided, but as early as it can reasonably do so it will procure the necessary relinquishments and notify said party of the first part or its duly authorized agent, pointing out the lands desired to be selected for it and delivering to said Agent of the State the relin-

quishments or assignments of entrymen which may be necessary to be secured so as to meet the exactions of the Land Department of the United States."

It was further undertaken in and by said contract that there should be no expense to the State in trying to secure relinquishments of homestead entries so that the State might comply with the United States Land Department requirements and make its "filings" thereon.

Pursuant to the contract and undertaking of Mr. Lamar, he made various filings in the Government Land office, and managed to secure certifications to the State of 697.11 acres, which, under the contract with the T. C. I. Company, were sold to that company, and title accordingly made. But Mr. Lamar reports that he is unable to secure to the State any more acreage. It would thus appear that the State is unable to make delivery beyond 697.11 acres, for which it has been paid, and of course if it has not the lands to sell, and cannot make good title to them, it could not, under the contract, hold the T. C. I. Company for payment of the twenty-five (\$25.00) dollars per acre contracted to be paid.

I note from the letter of former Superintendent of Education, Hon. William F. Feagin, dated July 22, 1915, that he undertakes, in recognition of the State's inability to make delivery, to abrogate the contract pro tanto, that is to the extent of the then certified inability of the State to make deliveries, but this letter does not appear to have the sanction or approval of the Governor. He does attach a letter from Hon. W. H. Mitchell, then Assistant Attorney General, advising Mr. Feagin that he and the Governor might modify the contract, but nowhere does it appear that the Governor approved the proposed modification or assent of Mr. Feagin. Consequently I conclude that the modification intended by Mr. Feagin was ineffectual, since it was without the approval of the Governor, and consequently leaves the original contract to stand in toto as originally drafted. But this is unimportant, since the State itself was unable to make deliveries. As said above, it could not insist upon payment where the contract was impossible of performance, by reason of its own failure.

I conclude, therefore, that the State cannot enforce the original contract, and insist upon payment where it did not

have the lands contemplated in the contract to deliver, or was unable to secure them.

I note from the letter of Mr. Howard Lamar, of March 12, 1919, that he proposes the following:

"This Company (T. C. I. Co.) has suggested to me that it would be willing to accept from the State a conveyance of the Southeast quarter of the Southeast quarter (S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$) Section 10 Township 18, South, Range 7 West (which is a tract secured by me to the State, but which had not been any portion of the lands designed by said company for selection under said contract) in consideration of the one thousand (\$1000.00) dollars heretofore paid by it to the former Superintendent of Education at the time of the execution of said contract and have the contract as to the remaining lands abated, or said contract to be treated as having been complied with so far as any further obligation on the part of the State or of said company, or said Company is willing to accept and pay for other indemnity school lands in lieu of the specific lands contemplated in said contract, and which it has not received because of the failure of the State to secure titles thereto. Should this suggestion meet with your approval, it has suggested that it would be willing to accept and pay the full price of twenty-five (\$25.00) dollars per acre as per the original contract, for such additional lands as you might require it to accept. The same to include the following indemnity school lands, namely—the north half of the northwest quarter (N $\frac{1}{2}$ of the N. W. $\frac{1}{4}$) Southwest quarter of the Northwest quarter (S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$), Section 20, Tp. 18, South Range 6 West, Southeast quarter of Northeast quarter (S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$) Section 4, Tp. 19 South, Range 6 West, or other indemnity lands in Township 18 of Range 7 West, which may be agreed upon."

So far as the suggestion just quoted from the letter of Mr. Lamar is concerned this would necessitate a new agreement, and it a matter addressed to your discretion as to whether or not you think the proposition should be entertained, or whether you are desirous of selling said lands for the stipulated price.

In view of the impossibility of performance of the contract on the State's part, my conclusion is that the State could not sue upon this contract and recover, and as the matter stands, it is incumbent upon you to make the decision as to whether the contract shall be abrogated or carried through by the substitution of other lands not contemplated, which are to be sold at the rate of twenty-five (\$25.00) dollars per acre.

I notice from the correspondence that there are certain expenses which are charges against the one thousand dollars initial payment under the contract, and whatever may be this net sum, I think you hold it for adjustment on the final accounting with the T. C. I. Company.

Very respectfully,
RICHARD EVANS,
Assistant Attorney General.

TAXATION:—Exemption of McGill Institute (Mobile) from county and municipal taxation under act approved February 15, 1897, is valid and irrevocable.

March 24, 1919.

Hon. T. W. Sims, Chairman,
State Board of Equalization,
State Capitol, City.

Dear Sir:

I have been asked by you to give a written opinion upon the validity of the exemption from taxation given McGill Institute in the City of Mobile by an Act of the Legislature of Alabama, approved February 15, 1897 (page 941 of the Acts.) The Act in question was one to amend the charter of the Institute, (Act 1896-7, p. 304), and enlarge its powers, and the exemption is in the following language:

“That the Board of Trustees shall have the right to own, hold, sell, convey, exchange, or otherwise dispose of real and personal property, acquired by them as such trustees for the use of said institution of learning for the amount of \$400,000, and the sum to the value of \$200,000 shall be exempt from all county and municipal tax from the City and County of Mobile so long as the income from said property be exclusive-

ly used in the payment of teachers and other expenses of said McGill Institute."

It will be observed that the Act in question contains no exemption from State taxation.

At the time it was granted such exemptions were not prohibited by the Constitution of the State. Other institutions of learning enjoy exemptions, for instance, Howard College, under an Act of the Legislature of 1886-7. The Constitution of the United States grants certain powers to the Federal Government necessary for the preservation and enjoyment of a Federal Government. The several states in the Union are themselves sovereign, and their Constitutions are not grants of power, but are limitations upon their inherent powers. There are practically no limits to the legislative power of a state over the subject of taxation, except so far as that power is restrained by fundamental law.

So it is not necessary to look to the State Constitution to find any authority to grant such exemptions as that in question. The Constitution need only be looked to, to see that the power to grant the exemption is not thus surrendered. The Constitution in existence at the time the Act in question became law contained no limitation on the power of the State to grant such exemptions, and consequently the exemption, having been regularly granted by the law-making power of the State, is valid.

That the Legislature is authorized to grant such exemption was recited in the case of the State v. Alabama Bible Society, 134 Ala. 632.

The exemption having been found to be valid, you then, as I understand it, want an opinion as to whether it can be revoked or taken away. The Constitution of the United States provides, Article 1, Section 10:

"No State shall pass any law impairing the obligation of contracts."

The State Constitution is to same effect.

In accordance therewith it has been held that when, under power in charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.

The foundation of the doctrine was laid in one of the notable opinions of Chief Justice Marshall, *Fletcher v. Peck*, in 1810, wherein it was held that this provision of the Constitution extends to contracts to which the State is a party, that is, to legislative grants. The court said that while one legislature is competent to repeal an Act of general legislation, which a former legislature was competent to pass, yet if an Act is done under a law, a succeeding legislature cannot undo it.

To review the many cases that follow would consume many pages. It is sufficient to say that it is now generally accepted that such grants are irrevocable, that the provision of the Constitution of 1875, of force at the time this charter was granted, inhibiting laws making irrevocable grants of special privileges or immunities was intended only to prohibit the granting of special privileges in the nature of a monopoly. *Birmingham Railway Company's case*, 76 Ala. 465. *Bienville Water Supply Co. v. Mobile*, 186 Ala. 213.

Very respectfully,
L. E. BROWN,
Assistant Attorney General.

MARRIAGE:—Acts 1915, page 137, amending section 7700 of Code of 1907, does not apply to persons lawfully married, nor prohibit marriage of girl under 16.

March 19, 1919.

Mr. G. W. Weaver,
Probate Judge, Shelby County,
Columbiana, Ala.

Dear Sir:

Your favor of March 17, asking an official opinion as to whether Section 7700 of the Criminal Code, as amended by an Act of the Legislature of 1915 (Acts 1915, page 137) affects Section 4879 of the Code, has been referred to the writer and in reply thereto I beg to advise you that in my opinion Section 7700 of the Code, as amended, was not intended by the Legislature to apply to persons who are lawfully married, and neither was it intended to prohibit the marriage of a girl under sixteen years of age.

The Supreme Court has construed Section 4879 of the Code, and they hold that even though a marriage is contracted by parties below the legal age therein specified, to-wit, seventeen years for men, and fourteen years for girls, yet in such cases such marriage is not absolutely void, but voidable—that is to say, it is subject to disaffirmance if the right to disaffirm is exercised before the parties arrive at the legal age.

I am of the opinion that it cannot be seriously contended that the Legislature intended to repeal this well established rule of law by the enactment of the amendment to the Section of the Criminal Code above referred to.

Very truly,
HORACE C. WILKINSON,
Assistant Attorney General.

PRINTING AND DISTRIBUTION: COUNTY DEPOSITORIES:—

Secretary of State not required to furnish copies of 1907 Code to banks acting as county depositories.

March 25, 1919.

Hon. W. P. Cobb,
Secretary of State,
State Capitol.

Dear Sir:

I beg leave to acknowledge receipt of your letter of March 18, in which you ask the advice of this office as to whether or not you should furnish one copy of the Code of 1907 to the county depositories, and in reply I beg to advise that, under an Act approved July 27, 1907, (General Acts of 1907, p. 504), Section 12 provides that the Secretary of State shall furnish one copy of the Code of 1907 to, among others, each county treasurer in the State. And also an Act approved September 15, 1915, (General Acts of 1915, p. 348), abolishing the office of county treasurer in certain counties, provides for the designation of banks in the respective counties to act as county depositories, and charges said banks with all the duties, and subjects them to the same liabilities as were formerly imposed by the county treasurers. Section 12 of this act further provides that all duties required to be performed by the county treasurer, outside of the receipt and disbursement of the county

funds, shall be performed by the president of the board of revenue or court of county commissioners.

Under the act above referred to making banks depositories of county funds, you will note they are charged only with the duties of receipting for and disbursing county funds, and all other duties are to be performed by the president of the board of revenue, or court of county commissioners, I therefore beg to advise you that, in my opinion, the Secretary of the State is not required to furnish a Code of 1907 to these county depositories.

Very truly,

J. Q. SMITH,
Attorney General.

JEFFERSON COUNTY:—Board of Revenue is authorized to furnish clerical assistant for Municipal Court of Birmingham.

March 27, 1919.

Hon. Joseph R. Tate, Solicitor,
10th Judicial Circuit,
Birmingham, Ala.

Dear Sir:

In reply to your letter of recent date, asking the opinion of this Department as to whether or not the Board of Revenue of Jefferson County is authorized to furnish clerical assistance for first division municipal court of Birmingham, I beg to advise you as follows: :

The act creating the municipal court of Birmingham, approved July 12, 1915, provides in Section 28, that the Board of Revenue shall provide suitable court rooms, dockets, books, etc., and *for any other incidental expenses*. In view of this express provision in the Act, I am of the opinion that if the Board is satisfied that the help now authorized by law is adequate to properly to transact the business of the court, it can, in its discretion, provide for such other clerical assistance as it deems necessary to properly transact the business of said court.

Yours very truly,

HORACE C. WILKINSON,
Assistant Attorney General.

PROHIBITION LAWS:—Bevo and other drinks resembling alcoholic beverages, though containing less than one-half of one per cent of alcohol, are expressly prohibited by law.

March 28, 1919.

Merchants Grocery Company,
Demopolis, Ala.

Gentlemen:

Your favor of March 27, addressed to this office requesting a copy of the opinion relating to sale of beverages containing less than one-half of one per cent alcohol, has been referred to me, and in reply thereto I beg to advise you that the newspapers' accounts were not entirely accurate.

What was decided by this office in said opinion, was that the prohibition laws did not prohibit the sale of a beverage that did not in a general way, or in some way, resemble prohibited liquors and beverages as those terms are defined in the prohibition laws, provided the aforesaid beverage did not contain over one-half of one per cent alcohol. On the other hand, care was taken to point out that if a beverage looked like, tasted like, smelled like, or foamed like any of the prohibited liquors or beverages, or could in any way be used as a substitute for such prohibited liquors or beverages, or could be used as a means of, or aid to, the violation of the prohibition laws, the possession or disposition thereof is condemned and made unlawful by the law above referred to. It was this part of the opinion that the papers failed to emphasize.

The effect of the opinion is this: To permit the sale of ice cream sodas, coca colas, and soda water, which contain a mere trace of alcohol, which is used for the purpose of cutting the oil in the flavoring extract. But the opinion does not authorize the sale of any beverage like "Bevo," or anything of that kind, even though such beverage contained no alcohol whatever, as the possession and the disposition of a beverage of that kind is expressly prohibited by law.

Yours very truly,
HORACE C. WILKINSON,
Assistant Attorney General.

PRINTING AND DISTRIBUTION:—County Commissioners may have county treasurer's reports printed, the only limitation being that in counties under 40,000 the cost shall not exceed \$100.

March 29, 1919.

Hon. C. F. Dodson,
Heflin, Ala.

Dear Sir:

I beg to acknowledge receipt of your letter of March 27, in which you inquire as to the charge in the matter of printing County Treasurer's Reports.

In section 211 of the Code of 1907, Subdivision 11, you will find a provision to submit to the court of County Commissioners, at the first term of each year, the register of claims; his accounts for the year balanced; vouchers for the payments; an estimate for the indebtedness of the county for the coming year, and the means for providing for the same.

We also refer you to an Act of the Legislature of 1915, page 823, Section 2. The only limitation on the amount to be paid is that it shall not exceed one hundred dollars in counties of less than forty thousand population according to the last Federal census. I do not know of any other law covering this subject, and it is my judgment that the Board of County Commissioners will have a right to make such contracts for printing said report as they may deem wise. The only limitation being that in the counties under forty thousand it shall not exceed one hundred dollars.

Very truly,

J. Q. SMITH,
Attorney General.

SCHOOL LAWS:—An election on three-mill tax called February 11th should be held under provisions of act approved February 13th following.

March 31, 1919.

Hon. Spright Dowell,
State Superintendent of Education,
State Capitol, City.

Dear Sir:

In reply to your inquiry of March 31, relative to election called in Baldwin County on February 11, to determine

whether a district three mill school tax should be levied, and inquiring whether the election should be held under the old law or under the Act of Legislature approved February 13, 1919.

I beg to advise that the latter Act repealed the former and that any elections now held should be in compliance with the latter Act. I do not care to go so far as to say that where the proceedings were instituted before the adoption of the new Act, that the proceedings would be illegal unless begun over again and the new Act conformed to in its entirety. But I could not advise any other procedure than starting over again and complying with the new Act.

Very truly yours,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS:—Amount due State employee at time of his death may be paid, if there is no administrator, to father of deceased, provided he gives sufficient bond.

April 1, 1919.

H. F. Lee, Esq.,
Capitol.

Dear Sir:

Replying to your inquiry of March 31, in regard to payment of sum due R. J. Barr, Jr., deceased, for services as Live Stock Sanitary Inspector.

After considering the correspondence attached to your letter I beg to advise that the payment could properly be made to the father of the deceased, provided he gave a bond to protect the State Treasurer in the event any one entitled to the proceeds of the bond should make claim for it. The creditors of the deceased man have the first claim upon the fund—funeral expenses and expenses of last sickness have preference. After the debts are paid, or in the event there were none, the fund would go to the children of the deceased or their descendants, if any, and I take it that there are none in this case. Both parents living, then it goes to the father and mother in equal parts and if there is only one surviving parent, then half to such surviving

parent and half to the brothers and sisters in equal parts.

At this time there could be no presumption that there were no creditors of the estate. The only way for the money to be paid out without administration at this time, would be for the father of the deceased to satisfy the State Treasurer in such way that the State Treasurer would be willing to make the payment and assume the risk to be run in consequence of making the payment to other than the administrator of the estate.

Very truly,
J. Q. SMITH,
Attorney General.

BOARD OF CONTROL AND ECONOMY:—Act authorizing payment of salaries and expenses implies appropriation from State treasury of money to cover, though it is advisable that such appropriation be expressly made.

April 2, 1919.

Mr. W. D. Nesbit, Chairman,
Board of Control and Economy,
Capitol.

Dear Sir:

I have your inquiry of April 1, desiring to know, as I understand it, whether in the Act creating the State Board of Control and Economy, or in the general Appropriation Act, there is a sufficient provision for the payment of the salaries of the members of the commission, compensation of employees, and expenses of the commission.

The inquiry was doubtless brought forth by the absence from the Board of Control Act (Acts 1919, p. 43) of the stereotyped words "There is hereby appropriated out of the State Treasury dollars to meet the expenses incurred under the provision of the Act;" thus raising the question whether making the payment of money out of the State Treasury under the provisions of the Act, would be violative of that provision of the Constitution which provides that "no money shall be paid out of the Treasury except upon appropriations made by law."

Of course it is fundamental that the Constitution of the State is a limitation upon the powers vested in the Legis-

lative departments of the State—all governmental powers being vested in the Legislature except such as are granted to the other departments of the Government, or expressly withheld from the Legislature by Constitutional restriction. It follows that every reasonable presumption is in favor of the constitutionality of a statute enacted by the Legislature.

While it is true that the Board of Control and Economy Act does not employ the language usually found in laws appropriating money, still I am of the opinion it was not the intention of the Legislature that the payment of all the salaries and expenses authorized to be incurred under authority of the Act, were to be postponed until some future Legislature should make the necessary appropriation for their payment. The Legislature intended to provide for the payment of salaries and expenses as they accrued. The provision of the Constitution referred to was obviously inserted to prevent the expenditure of the people's money without their consent, either as expressed by themselves in the organic law, or by their representatives in valid acts of legislation. All the expenses of the Government being paid by the people, it is the right of the people not only not to be taxed without their own consent, or that of their representatives, but also to be actually consulted upon the disposal of the money, the object and purpose of the rule requiring appropriations being intended alone to limit the power of the rulers and executive officers, and never intended to limit the power of the Parliament in England, or the Congress, or the Legislatures of the several States in this country. The only question here for consideration is, have the people given their consent to the expenditure contemplated by the Act in question. Is it from an examination of the entire Act that the will of the framers thereof may be truthfully and accurately ascertained. It would be a superficial opinion that would test the validity of the Act by the use of stereotyped technical words and expressions; it must be construed in the large and liberal spirit which has only in view the purpose of determining the Legislative intent. I cannot believe that it was the intention of the Legislature that the various salaries and items of expenses which the Act expressly authorizes and which are necessary in carrying on the Government of the State

(as the Legislature necessarily thought by passing the Act) were to be incurred without provision for their payment.

There is strong argument against the policy of such legislation and much force in the contention that all appropriations should be of an amount certainly ascertained prior to the appropriation, but there is no requirement of that kind in the Constitution; it leaves the power untouched and although it may be unwise, unsafe and very loose legislation, there is nothing in the Constitution so plainly and palpably prohibiting this species of legislation, as to require us to say it is in violation of that instrument—unsafe, loose and dangerous though it may be.

It follows the foregoing, that the Auditor is authorized to draw warrants on the State Treasurer covering such salaries and expenses as your board may properly certify to him as due, and on such warrants the necessary funds may be legally drawn from the State Treasury.

Very truly,

L. E. BROWN,
Assistant Attorney General.

BOARD OF CONTROL AND ECONOMY:—Eleemosynary institutions of State expend State funds under direction of Board of Control and Economy; warrant is made to custodian appointed by Board of Control of each institution. Certain institutions to be classed as eleemosynary.

April 2, 1919.

Hon. H. F. Lee
State Auditor,
Capitol.

Dear Sir:

In reply to that part of your inquiry of April 1, as to how appropriations for eleemosynary and charitable institutions shall be drawn from the State Treasury under Section 5, of the Act creating a State Board of Control and Economy (Acts 1919, p. 44).

I am of the opinion that warrants for the expenditures of these institutions should be made payable to the custodian of those funds provided by the Boards of Control of the several institutions. The expenditure of the funds

drawn is, of course, under the control of the State Board of Control and Economy, and the custodian selected by the Board of the several institutions must act under and in conformity to the requirements of the Board of Control and Economy.

Answering the last inquiry contained in your letter above mentioned as to whether the following institutions are properly classed as eleemosynary and charitable institutions:

Deaf, Dumb and Blind Institution, at Talladega; The Alabama Insane Hospitals; Mercy Home Industrial School; State Training School for Girls; Alabama Boys Industrial School; Alabama Reform School for Juvenile Negro Lawbreakers; The Confederate Soldiers Home.

I beg to advise that I am of the opinion that each and all of the institutions mentioned come under the denomination of eleemosynary institutions, as distinguished from strictly educational institutions, as mentioned in Section 14, of the Board of Control and Economy Act.

Very truly,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS: CIRCUIT JUDGES AND SOLICITORS:—Act of 1919 fixing compensation of circuit judges and solicitors is constitutional; judges holding office at time of passage of act may receive benefit; salaries of judges are payable without being audited and allowed by board of revenue and are classed with preferred claims against the county.

April 3, 1919.

Hon. W. T. Seibels,
Solicitor Fifteenth Judicial Circuit,
Montgomery, Ala.

Dear Sir:

I have your inquiry of March 18, desiring to be advised as to the legality of the Act of the Legislature fixing the compensation of certain Circuit Judges and Solicitors (Acts 1919, p. 2.)

As I understand it you desire to be advised (1) as to the legality of the Act; (2) as to how it affects judges whose salaries will be increased during the term for which they were elected; (3) whether the County Treasuries of the several counties in your circuit are authorized to pay their pro rata share of the salaries, as contemplated by the Act in question; (4) whether the pro rata of these salaries to be paid by the several counties have any preference of payment from the funds of those counties.

I am of the opinion that the Act in question is valid and binding upon the several counties affected by it. That it increases the salary of a judge during the term for which he was elected, will not prevent him from enjoying the benefits of the increase. It is the duty of the presidents of the Boards of Revenue of the several counties when advised that such salaries are due, to issue warrants for their payment, the claims not being required to be audited and allowed by the respective Boards of Revenue. The payment of these salaries has preference, along with the claims of jurors and other obligations prescribed and imposed by law, over other obligations which the county may incur.

Very truly,
J. Q. SMITH,
Attorney General.

TAXATION:—Automobiles brought into the State after October 1st taxed as merchandise in hands of dealer or as property in hands of individuals.

April 4, 1919.

Mr. Thomas W. Sims,
State Board of Equalization,
Capitol.

Dear Sir:

In reply to your inquiry of April 3, with reference to taxation of automobiles brought into the state after the first of October, I beg to advise as follows:

Where automobiles are brought into the state by dealers in the state, the title to the automobiles passing to local dealers, they are taxed as are stocks of merchandise, un-

der Section 4, of the 1915 Revenue Act, found on page 390, of the Acts of that year. That is, the assessment to be on the average amount of automobiles handled during the preceding year. Where the automobile is brought into the state after the first of October and the title never having passed to the local dealer, the automobile will be taxable for the current year against the first owner, subject to the exception contained in Subsection 14, of Section 7, page 392, of the Revenue Act above referred to, which provides that all property brought into the state after the first day of October and before the assessor has completed his assessment, shall be subject to taxation the same as if it had been here, or owned in the state on the first day of October; except where property is brought into the state by a citizen of the state, purchased with money held on the first day of October, which money has been assessed for taxation that year.

Very truly,
L. E. BROWN,
Assistant Attorney General.

COUNTY EXPENSES:—Tick eradication laws must be carried out and county may borrow money for the purpose.

April 4, 1919.

Hon. M. T. Ormond, Solicitor,
Tuscaloosa, Ala.

Dear Sir:

I beg leave to acknowledge receipt of your letter of April 3, enclosing a letter from Judge J. T. Maddox of Lamar County, and also a statement of the county treasurer in which he makes the inquiry as to whether or not the county is authorized under the law to borrow money for tick eradication, or if it would be authorized to issue interest bearing warrants for this purpose. In answer thereto I beg leave to advise that it is the duty of the County Commissioners to carry out the new tick eradication law as far as it is within their powers.

I beg leave to call your attention to an Act of the Legislature of 1915, page 105, Acts of 1915, which gives the County Commissioners, or Board of Revenue, or other gov-

erning body of the counties of this State, the authority to make temporary loans in anticipation of the collection of taxes for the year in which such loans are made, and to issue certificates covering such loans, and to pledge a sufficient amount of uncollected taxes of the current year to secure the repayment of such loans. This Act does not in my judgment, prevent the Board of County Commissioners from using the money for tick eradication. It seems to me that it can be used for any legitimate purpose that the Board of County Commissioners think necessary.

I think a careful reading of this Act will answer the question propounded.

Yours very truly,

J. Q. SMITH,
Attorney General.

U. S. GOVERNMENT LANDS AND BUILDINGS:—Sections 898 and 899 of Code of 1907 cede to United States exclusive jurisdiction except for service of process of property theretofore or thereafter ceded to the United States.

April 7, 1919.

Hon. Thos. E. Kilby,
Governor,
Capitol.

Dear Sir:

The letter of Hon. J. H. Moyle, Assistant Secretary (U. S.) Treasury, in re: re-enactment of a law ceding to the United States lands purchased for public buildings, etc., forwarded by you to this office has had attention and in reply, I beg to advise:

Code (1907) sections 898, 899, cede to the United States except for purposes of service of process, exclusive jurisdiction over lands purchased by the United States and used for post offices, custom houses, court houses, armories, forts, navy yards or other public buildings or places, so long as the same are owned by the United States; the cession ex vi termini applies not only to lands already ceded but to such as may be ceded in the future.

Code section 2427 provides that the Governor may upon application to him in writing supported by proper evidence

of purchase, etc., cede to the United States jurisdiction over lands purchased.

Said sections 898 and 899 were enacted February 9, 1903, (Acts 1903, p. 43) and the section 2427 has come down from the Code of 1852: all these were brought forward and re-enacted as parts of the Code of 1907.

In view of the difference in these statutes the Treasury Department deems it expedient to iron out the inconsistency or discrepancy in the existing statutes by a new enactment, and to this end suggests the passage of the Wisconsin statute (1913), Chapter 1, 2a, 2b, and 2c.

The proposed Wisconsin statute in subject matter is about the same as our Code sections 898 and 899; the request of the Department, however, would seem to be timely and expedient.

I therefore have made a draft of the Wisconsin statute affixing an appropriate title to meet constitutional requirements, which you will please find herewith enclosed. The letter of Hon. J. H. Moyle and enclosure transmitted therewith are also herewith returned.

Very truly,
RICHARD EVANS,
Assistant Attorney General.

FERTILIZERS:—Registration of a trade name by one manufacturer gives him exclusive proprietary interest in such name. Name of manufacturer must be attached to each bag of fertilizer.

April 8, 1919.

Hon. M. C. Allgood,
Commissioner of Agriculture,
Capitol.

Dear Sir:

Your communication of the 3d inst., with attached letter of Mr. J. W. Whatley, sales manager of the T. C. I. Company upon whose letter you base your inquiry, was duly received, and in reply we beg to advise as follows:

“All manufacturers, jobbers and manipulators desiring to sell or offer for sale fertilizers or fertilizer materials in this State shall file the name of the brand desired to be employed, together with the name of the manufacturer and

the guaranteed analysis," etc., Acts 1907, p. 744. The Act governing the registration, branding, etc., of commercial fertilizers contemplates the adoption and registration of a brand or trade name by each manufacturer, jobber or manipulator dealing in fertilizers, and while the act does not say so, it is manifest there cannot be different registrations of the same name. This being true, the adoption and use of the registered name "Arcadian" by the Barrett Company or its agents, may be said to have given that company a proprietary interest in that name or brand.

If the name "Liberty" is not now registered, the T. C. I. Company, or anybody else can adopt and register and sell under that name, either by itself or its agents. Whether the Barrett Company should discontinue the use of the name "Arcadian" and adopt the name of "Liberty" is a matter with which you have no concern or direction. It is entirely a matter between the T. C. I. Company and the Barrett Company as to how certain manufactured products should be marketed.

Should the T. C. I. Company adopt and register the name "Liberty," as said above, it may market its products through its agents, and if the Illinois Steel Company sells its products as the agent, it could do so under the trade name "Liberty."

In reference to your last inquiry, as to whether the manufacturer's name should appear on the bag, please refer to section 4 of the fertilizer law, Gen. Acts 1907, p. 745, which reads as follows:

"Any person, company, manufacturer, dealer or agent before selling or offering for sale in this State any commercial fertilizer or fertilizer materials, shall fasten or attach to each bag, barrel or package, the brand name of the fertilizer, the weight of the package, *the name and address of the manufacturer* and the guaranteed analysis, etc."

Trusting that this may answer your several inquiries, I am

Very truly yours,
RICHARD EVANS,
Assistant Attorney General.

MILITARY DEPARTMENT:—State Disbursing Officer is not entitled to certain additional compensation.

April 9, 1919.

Hon. Thos. E. Kilby,
Governor,
Capitol.

Dear Sir:

Replying to your inquiry as to the claim for compensation made by Major G. C. Scherer, former State Disbursing Officer in the Adjutant General's office, appointed under section 7 of the 1915 military act found on page 748 of the Acts of the Legislature of that year, I beg to advise that, as I understand it, Major Scherer's status is the same as that of Major T. C. Locke, former Assistant Adjutant General, and Captain J. W. Tyson, former Assistant Property Clerk.

Attached hereto as exhibit "A," is an opinion rendered by this office on August 15, 1916, in which it was held that Major Locke and Captain Tyson were not entitled to compensation under the same circumstances under which Major Scherer is now asking for compensation.

I am also attaching hereto as exhibit "B," a copy of an opinion of the Attorney General of date June 27, 1917, which, as I understand it, is the opinion referred to by Major Scherer in paragraph 7 of his letter to you of date, 3d inst.

From an examination of the two opinions, it will be seen that the latter opinion was not intended to overrule the former opinion, but expressly affirms its soundness. It was not the purpose of the latter opinion to pass upon the legal right of Major Locke and Captain Tyson to compensation from the State, but was only intended to set out the duties of the Auditor under the conditions therein stated.

In view of the foregoing, having no reason to change the conclusion reached in the opinion of August 15, 1916, I must advise you that I am of the opinion that Major Scherer is not entitled to the compensation claimed.

Very truly yours,

J. Q. SMITH,
Attorney General.

PROHIBITION LAWS:—Informer's fee of \$50 is collected in same manner as other costs.

April 10, 1919.

Hon. John W. Lane,
Sheriff of Chambers County,
Lafayette, Alabama.

Replying to your inquiry of the 7th, in reference to the fifty (\$50.00) dollar cost provided for by Section 10, of the Bone Dry Law (Acts 1919, p. 11), I beg to advise that this cost is collected in the same way and the same manner that other costs are collected.

Section 6575 of the Code provides that after conviction the clerk of the court in which the conviction is had shall make out a bill of cost in the case which he forwards to the President of the Board of Convict Inspectors, who approves the same, if found correct, and requests the State Auditor to draw his warrant upon the State Treasury for the payment of said bill. It is true that this item of \$50.00 cost is not enumerated in Section 6575, but in my opinion, Section 10 of the Bone Dry Law reads this particular item into that Section and makes it a part thereof.

Very truly,
J. Q. SMITH,
Attorney General.

TAXATION: SCHOOL SYSTEM:—Three-mill tax voted for during 1919 should be levied and collected as other taxes for that year.

April 11, 1919.

Hon. W. G. Carleton,
Judge of Probate, Tallapoosa County,
Dadeville, Ala.

Dear Sir:

Your inquiry of April 9, desiring opinion of this office as to when the three mill tax, authorized by a vote of the people of your county on the first day of April, 1919, should be levied, has been referred to me and in reply thereto I beg to advise you.

By an Act of the Legislature, approved September 10, 1915 (Acts 1915, page 362), it is provided that, if such taxation is authorized by a majority vote, "the court of Coun-

ty Commissioners shall levy said special tax and cause the tax assessor to assess the same on the taxable property in said county;" I construe this to mean that the Court of County Commissioners shall forthwith levy the tax authorized, and that this tax should be collected at the same time other taxes are collected, that is to say, the tax should be levied and collected for the year 1919.

This three mill tax is in addition to the one mill tax you are already collecting and the one mill tax is not in any way affected by the three mill tax; in other words, both taxes should be collected.

Yours very truly,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS: SHERIFFS:—Act approved January 27, 1919, does not inure to benefit of sheriffs in office at time of its passage.

April 11, 1919.

Hon. J. A. Jackson,
Sheriff of Shelby County,
Columbiana, Alabama.

Dear Sir:

In reply to your favor of April 9th, I beg to advise you that section 281 of the Constitution of Alabama provides that "the salary, fees or compensation of any officer holding any civil office of profit under this State or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

In view of this express provision of our Constitution I am of the opinion that the Act approved Jan. 27, 1919 (Acts 1919, p. 4), wherein and whereby an increase in fees and compensation for the various sheriffs was provided, does not affect or apply to the sheriffs who took office prior to the approval of said act, as any other construction would make the act in question violative of the aforesaid section of the Constitution.

Very truly yours,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS: SHERIFFS:—Act of January 22, 1919, does not inure to benefit of sheriffs in office at time of its passage.

April 11, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol, City.

Dear Sir:

Replying to your communication of the 11th inst., enclosing a letter from Judge J. F. Koonce, asking when the sum of six hundred (\$600.00) may be allowed to sheriffs for ex-officio services not otherwise provided for under an Act approved January 27, 1919, amending Code Section 3722 (Acts 1919, p. 4), I beg to reply as follows:

Section 281 of the Constitution reads, "The salary, fees, or compensation of any officer holding any civil office of profit under this State or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

I, therefore, beg to advise you that no sheriff will derive advantage from the increase unless he was elected to office after the enactment of said provision.

Yours very truly,

J. Q. SMITH,
Attorney General.

PROHIBITION LAWS: SHERIFFS:—General fee bill of section 6638 of Code of 1907 governs execution of warrants in whiskey cases.

April 12, 1919.

Mr. J. D. Stewart,
Sheriff of Coffee County,
Enterprise, Ala.

My dear Sir:

Your letter of the 8th inst., has been received.

I am of the opinion that the general fee bill of Code Section 6638, as amended by General Acts, 1911, page 41, governs the executing of search warrants in whiskey cases; as there is no distinction between search warrants for whiskey cases and any other cases.

Yours very truly,

J. Q. SMITH,
Attorney General.

INSURANCE: TICK ERADICATION:—Contract guaranteeing against damage to animals from dipping, on consideration of payment of 4% of value for supervising dipping, does not constitute contract of insurance.

April 17, 1919.

Hon. C. B. Smith,
Commissioner of Insurance,
Capitol.

Dear Sir:

Your favor of April 15, requesting an opinion as to whether or not the enclosed dipping contract on the part of U. F. Gibson and E. P. Gay of Ashland, Alabama, constitutes a contract of insurance, has been referred to the writer, and in reply I beg to advise you that in my opinion said contract does not constitute a contract of insurance.

The substance of this dipping contract is that the parties thereto agree upon a value of the animal to be dipped. One party agrees to supervise the dipping for four per cent. of the value of the animal. And he further agrees that if the animal is injured or damaged while being dipped, that he will take the animal and pay the agreed value thereof to the other party. This merely constitutes a contract for the performance of personal services with a guarantee to the effect that no injury will result while such service is being performed.

Very truly,
HORACE C. WILKINSON,
Assistant Attorney General.

LICENSES: AUTOMOBILES:—Counties may impose additional license tax on commercial automobiles but not on cars for owner's private use. Acts of Sept. 14, 1915, and Sept. 22, 1915, both stand.

April 19, 1919.

Hon. W. S. Keller,
State Highway Engineer,
Capitol, City.

Dear Sir:

Replying to your inquiry as to whether courts of county commissioners or boards of revenue for the purpose of maintaining public roads may impose upon owners of ve-

hicles used upon said roads, license taxes as may be deemed advisable by said courts of county commissioners or boards of revenue, I beg to advise as follows:

By provision of an Act entitled an Act to prescribe and fix the license or privilege tax to be paid by every person, firm, company or corporation, etc., approved September 14, 1915 (Acts 1915, page 489), it is provided inter alia as follows:

"The registration fee or license tax herein required to be paid on automobiles or motor cars or motorcycles shall be *in lieu of all other privilege or license tax*, which the State or any county or municipality there-of might impose, where the automobile or motor car or motorcycle is used by the owner for his private use and that of his family; provided, however, that incorporated cities or towns are hereby authorized to collect a reasonable license or privilege tax on motor vehicles used for carrying passengers or freight for hire." (Acts 1915, page 493).

It is further provided in said act, page 493, as follows:

"The money collected for such license taxes shall be divided as follows: Forty per centum of the gross revenue derived from any incorporated city or town shall be paid by the judge of probate to the treasurer of the city or town in which the owner or licensee resides and forty per centum of the gross revenue derived from any county outside of any incorporated city or town shall likewise be paid by the judge of probate to the treasurer of said county; the remainder shall be paid by the judge of probate to the State Treasurer."

Such a provision apportioning certain amounts of the license tax to the city and county, and which is declared to be in lieu of all other taxes, has been declared by our Supreme Court not to offend section 221 of the Constitution in the case of *ex parte Bozeman*, 183 Ala. 91.

Subsequent to the enactment of the license schedule act approved September 14, 1915, above alluded to, an act was approved September 22, 1915, known as the Goode Act

(Acts of 1915, page 573), section 13 of which provides as follows:

"That the courts of county commissioners, boards of revenue or other governing bodies of the several counties, may for the purpose of maintaining the public roads, bridges and ferries of the county, impose upon the owners of vehicles which are used upon the public roads of the county, such license taxes for each class of vehicles as may be deemed advisable by such court or boards."

It will be observed that the language of said section 13, is broad and general. The word "vehicle" comprehending both those used for private or commercial purposes, and the question arises whether this section would by implication repeal or amend the license schedule act imposing one license, which it was provided should be in lieu of all others, both for State, county and city. If section 13, *supra*, be held to amend or repeal pro tanto the license act of 1915 (Acts of 1915, p. 493), so far as county purposes are concerned, the status would then be that there would be on automobiles used for private purposes no fixed or certain license, because by the terms of said section 13, the language is, "as may be deemed advisable by such courts or boards." Nor could said section 13 be held to be cumulative, for then we would have the imposition of two county license taxes on the same vehicle; i. e., on automobiles used for private purposes.

The rule of statutory construction requiring that acts that are in *pari materia* should be construed together, applies with peculiar force to statutes passed at the same session of the legislature. It is to be presumed that such acts are imbued with the same spirit, and actuated by the same policy, and *they are to be construed together as if parts of the same act*. They should be so construed, if possible, as to harmonize, and force and effect should be given to the provisions of each; if however they are necessarily inconsistent, a statute which deals with the common subject matter in a minute or particular way will prevail over one of a more general nature; and of two inconsistent statutes enacted at the same session, that will prevail which takes effect at the later date." 36 Cyc., 1151, 1164.

While it is true that in the case of irreconcilable and repugnant acts the last one passed must go on as the expression of the legislative will, yet in order to work a repeal of the former, there must be plain, unavoidable and irreconcilable repugnancy, and even then the old law is repealed by implication only pro tanto to the extent of repugnancy. If both acts can be, by any reasonable construction, construed together, consist or stand together, both will prevail. See 36 Cyc. p. 1073, et seq.

Having in mind these canons of construction, I am of the opinion that a reasonable construction of the two said acts will permit both to stand, and give each a field of operation. That is to say, the license schedule act imposes a license tax for State, county and municipal purposes, apportioning the tax as provided in the act; and said section 13 of the Act of 1915, page 573, is applicable to all vehicles that may be licensed for purposes of maintaining public roads in the county to other than automobiles used for private purposes, and said section 13 should be read so as to limit its operation in this respect and harmonize with the first act above referred to, i. e., Act of 1915, page 493.

I have the honor to advise you that both acts may stand, and that counties may impose for the maintenance of public roads, a reasonable license tax upon vehicles used upon county roads other than automobiles used for private purposes.

Very truly yours,
RICHARD EVANS,
Assistant Attorney General.

CORPORATIONS:—Receivership on bankruptcy terminates existence of corporation if and when so ordered by court in which matter is pending.

April 21, 1919.

Hon. Thos. W. Sims,
State Board of Equalization,
State Capitol.

Dear Sir:

Replying to your inquiry of April 19, desiring to know when a receivership or bankruptcy terminates the existence of a corporation.

I beg to advise that whether or not a receivership or bankruptcy terminates the existence of a corporation, and if it does, when it takes effect is determined by the judgment of the court in the proceeding in which the receivership or bankruptcy is pending.

Yours very truly,

J. Q. SMITH,
Attorney General.

DENTISTRY:—Act of 1915, page 326, does not surrender police power of State to revoke licenses for cause.

April 22, 1919.

Dr. A. K. Parks,

Secretary, Board of Dental Examiners,
412-14 First National Bank Bld'g., City.

Dear Sir:

Your communication of the 19th inst, addressed to this office, and in reply I beg to advise as follows:

The right to license and the right to revoke the license of persons practicing dentistry in this State is set forth in a statute entitled "An Act to define Dentistry; to provide for the regulation thereof," etc. (Acts 1915, p. 326 et seq). The Board of Dental Examiners is authorized by section 9 of said act to revoke for causes set forth in said section, licenses issued to practice dentistry in this State. The method of procedure is set forth in said section and should be followed as to notice and the hearing and determining of cause, etc. If followed I think the board is unquestionably vested with the right of revocation of licenses for causes set forth in said section.

The action of the board in this behalf is a regulatory procedure springing out of the police power of the State designed to safeguard the public from improper and unworthy practitioners, and I am of the opinion that wherever just and proper cause exists for the revocation of a license, the same may be revoked after hearing no matter when the license was granted. In other words, the contention of counsel that the licensee in question is protected under section 2 of said act reading:

"That all persons now registered or licensed as dentists under the laws of the State of Alabama shall be entitled to continue in the practice of said profession unmolested by the provisions of this Act,"

is without merit and untenable. The right of revocation applies to all licenses when the proper cause exists and section 2 merely exempted licensees practicing at that time from further examination. If the contention of counsel were true, the licensee would have a vested right to continue the practice of dentistry, and the sovereign power of the State would be futile in the exercise of a police regulation to interpose for the protection of the public, which is manifestly untrue.

I therefore have the honor to advise that the right of revocation for cause may be exercised by your Board as provided by said section 9 subject to the right of appeal to the circuit court granted the licensee by said section.

Very truly yours,

J. Q. SMITH,
Attorney General.

DENTISTRY:—Dentists not registered or licensed at time of passage of act of 1915, page 326, though practitioners of more than twenty years standing, must obtain license from State Board.

April 23, 1919.

Hon. Frank O. Deese,
Ozark, Alabama.

My dear Sir:

Replying to your recent communication asking the status of practitioners of dentistry in view of the recent Act approved February 17, 1919 (Acts 1919, p. 148) repealing Acts 1915, page 923, which exempted practitioners of twenty years standing from obtaining a license from the Board of Dental Examiners, I beg to advise as follows:

The recent Act approved February 17, 1919, repealing Acts 1915, page 923, which authorizes practitioners of twenty years standing to continue without obtaining license from the Board of Dental Examiners, leaves the law as if no such provision with reference to exemption of twenty

years practitioners had ever been enacted; in other words, the only statute extant and of force is to be found in the General Acts regulating the practice of dentistry, etc., found in Acts 1915, page 326, et seq.

By the terms of this last mentioned Act all practitioners of dentistry are required to secure a license before the Board of Dental Examiners, except as provided in Section 2 of said Act, which exempted persons registered or licensed as dentists when said last mentioned Act went into effect.

It is my opinion, therefore, that all persons are required to secure a license before the Board of Dental Examiners, save and except only those persons who were registered or licensed as dentists at the time said Act (Acts 1915, page 326, et seq.) went into effect.

Very truly,
J. Q. SMITH,
Attorney General.

BANKS: TAXATION:—A bank that went out of business on January 31st is liable for the annual tax for that year.

April 23, 1919.

Mr. D. F. Green,
Supt. of Banks,
Capitol.

Dear Sir:

Replying to your letter of April 17, for an opinion on the question of whether the Nolen Bank, of Alexander City, would be liable for the tax for the year 1919 assessed against banks under the present banking law, in view of the fact that the bank went out of business on January 31, and your call for the payment of the tax was not made until February 4.

It is in contemplation of the Act that the tax be paid annually, payment to be based on the report made by the bank next preceding January first of each year. The bank in question did business during 1918 and notwithstanding it had ceased to do business at the time the call was made it did business during the month of January 1919 and is liable for the assessment made during that year. In tax

statutes, where the word "annually" is used, it does not permit a division of the tax dependent on the duration of the exercise of the privilege. *People v. Miller*, 85 App. Div. (N. Y.) 211. The call of the superintendent in no wise controls the question of whether the tax was payable or not. The superintendent might fail or refuse to make a call, but that would not defeat the collection of the tax. At most, it would only require action to be taken against him to compel him to perform his duty.

Under the circumstances, I am of the opinion that the Nolen Bank is liable for the tax for the year 1919.

Yours truly,
J. Q. SMITH,
Attorney General.

DOG LAW:—Person bitten by mad cat cannot claim expenses from dog fund under Act 1915, page 601.

April 23, 1919.

Judge A. W. Hargett,
Russellville, Ala.

Dear Sir:

I beg leave to acknowledge receipt of your letter of April 19, in which you ask to be advised as to whether or not a person who was bitten by a cat that was pronounced rabid by the Pasteur Institute, may have a claim against the dog fund as provided in an act of the Legislature of 1915 (Acts 1915, p. 601), and in answer thereto, I beg to state that you will find the following language used in the act on page 601:

"That if there is any surplus, after paying for the killing or injuring animals, it shall be applied by the probate judge to the payment of the traveling expenses and board of any person who has to attend the Pasteur Institute in Montgomery for treatment by reason of having been bitten by a *mad dog* and who are unable to pay for these expenses."

I therefore, beg to advise that the language of the statute is very certain and emphatic, and provides for only the expenses of persons who are bitten by a mad dog, and that

the claim for being bitten by a mad cat is an entirely different thing from being bitten by a mad dog, as provided in the statute, and I am of the opinion that this claim should not be paid.

Very truly yours,
J. Q. SMITH,
Attorney General.

PROHIBITION LAW: SHERIFFS:—New items of cost are applicable to present incumbents, without violating section 281 of the Constitution.

April 26, 1919.

Hon. C. B. Rogers,
President Board of Inspectors,
Convict Department, City.

Dear Sir:

Your communication of the 22d inst., requesting advice from the Attorney General as to whether the sum of fifty (\$50.00) dollars provided by Section 10 of the Act approved January 25, 1919, entitled "An Act to further suppress the evils of intemperance," etc. (Acts 1919, p. 11), should be taxed up in a bill of cost as provided in said Section and paid the sheriff now holding office, was duly received and in reply I beg to advise as follows:

The item of fifty (\$50.00) dollars carried in said Section 10 is designed to be paid as a reward to informers giving information leading to conviction for violation of the prohibition law, and said sum is to be taxed as part of the cost in the case. This item of cost is new and not included in the schedule of fees of sheriffs. I am of the opinion that a new item of cost may be awarded by an Act of Legislature so that it may be applicable to the present incumbents without infringing Section 281 of the Constitution with reference to increasing or decreasing fees and compensation of officers during their term of office.

In State, ex rel, Brandon, et al. vs. Prince, 74 So. 939, (1940), our Supreme Court said:

"Imposing new and additional duties upon certain officers and providing compensation to them for per-

forming the same, does not offend the Constitution (Sub-division 24 of Section 104) as against increasing the fees of officers by local laws."

The Section and sub-division referred to in the above opinion reads as follows:

Section 104. "The Legislature shall not pass a special, private, or local law in any of the following cases: (24) creating, increasing or decreasing fees, percentages or allowances of public officers."

While this Section had to do with the power to enact local legislation, yet it has a material and significant bearing upon the same question as to increasing or decreasing fees and the remarks of the court in this connection are of material importance in their bearing upon the matter now under consideration.

I, therefore, have the honor to advise you that in my opinion the item of fifty (\$50.00) dollars to be taxed up in cost as provided in said Section, is not unconstitutional and is not postponed to officers to be hereafter elected, but is applicable to present incumbents.

Very respectfully,
HORACE C. WILKINSON,
Assistant Attorney General.

HEALTH LAWS:—Physcial examination of man must have been made within fifteen days before application for marriage license.

April 28, 1919.

Hon. G. W. Weaver,
Judge Probate Court,
Columbiana, Alabama.

My dear Sir:

Your communication of the 24th inst., addressed to this office and in reply I beg to advise as follows:

The Act approved February 19, 1919 (Acts 1919, p. 169), providing for an ante-nuptial physical examination of men within fifteen days before granting a marriage license, makes it an obligation upon the applicant to present him-

self within fifteen days of the application for securing a marriage license to the examining physician to secure the certificate from the physician that he is free from disease. It is also made the duty of the Probate Judge to see that no license is issued without such a certificate, he observing the time to be noted from the certificate of the examination of the applicant.

I am of the opinion that if an applicant presents himself and secures the proper certificate required by the statute, he may on the same day present the same to the Probate Judge and secure a license to marry. If he should wait sixteen days before making his application, then he would have to undergo another examination and likewise, if the certificate presented to the Probate Judge should show that the examination was made more than fifteen days before the application for the license the Probate Judge should refuse to issue it without another certificate of examination which should be within the fifteen days as required by law.

Trusting that this may answer your several questions, I remain,

Very respectfully,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS: PROHIBITION LAWS: SHERIFFS:—Present incumbents are not entitled to benefit of increased fees authorized in Act approved January 27, 1919, but may receive \$50 reward in "still cases."

April 28th, 1919.

Mr. W. E. Gamble,
Sheriff of Dale County,
Ozark, Alabama.

My dear Sir:

Your inquiry of April 15th, 1919, asking the opinion of this office; 1st, as to whether or not you, as sheriff, are entitled to the increased fees provided for by an Act to amend Section 3722 of the Code, approved January 27th, 1919 (Acts 1919, p. 4), and 2nd, whether or not you, as sheriff, are entitled to the \$50.00 reward offered and authorized in still cases by the "Bone Dry Law" (Acts 1919, p.

11), has been referred to me and in reply thereto I beg to advise you as follows:

1. Assuming that you took office before the act to amend Section 3722 of the Code became a law, it is my opinion that you would not be entitled to the increased fees provided for therein; that the provisions of said act do not apply to a sheriff who was in office at the time the act was passed.

2. As to the sum of \$50.00 allowed in "still cases" as provided for by Section 10, of the Bone Dry Law, it is my opinion that this sum is payable in all cases to *the person* "who furnished the evidence and brought about the conviction and who shall satisfy the presiding judge that he is the person entitled to said sum," without regard as to whether such "person" was an officer or in office at the time the act known as the "Bone Dry Law" was passed.

While it is true that Section 281 of our Constitutional prohibits any increase in the salary, fees or compensation of an officer during the term for which he shall have been elected or appointed, it is my opinion that this sum of \$50.00 allowed by Section 10 of the Bone Dry Law, is not and was not intended to be any part of the salary, fees, or compensation of a sheriff as those terms are used in the law; but that on the contrary, this sum is offered in the nature of a reward to any and every person who shall furnish the evidence and bring about a conviction in such cases, provided, of course, that such person shall satisfy the presiding judge that he is entitled to said sum.

The mere fact that the person who furnishes the evidence and brings about the conviction, happens to be a sheriff or a Circuit Clerk or a Probate Judge, does not in my opinion disqualify him from receiving the sum here provided for.

A fee is a sum prescribed by law as a charge for services rendered by a public officer, and it might be well to add, that a fee, in the sense that the term is here used, can only be earned or charged by or allowed to a public officer, if the sum prescribed by law is payable to any person who performs the service required—then it is a reward and not a fee. Likewise, salary and compensation have well known meanings and it has never been held, so far as I can find, that a reward offered by the duly constituted authorities is in any sense a part of the salary or compensation of an officer holding any civil office of profit under this State, or that a reward so offered would become a part thereof be-

cause of the possibility that the officer might share in such reward.

Our Supreme Court has also said, in effect, that Section 281 of the Constitution does not prohibit the Legislature from laying new and additional duties on a public officer and providing a new and additional fee for the performance of that duty, and it has intimated at least that, if the alleged increase in fees, salary or compensation was not an increase in the direct and primary sense (*Dunn v. Dunn* 71 So. 715) then it was not forbidden by this Section of the Constitution.

For these reasons, therefore, I advise you that the \$50.00 provided for by Section 10 of the Bone Dry Law, is in my opinion, payable to any person who furnishes the evidence and brings about the conviction and who satisfies the presiding judge that he is entitled to said sum.

Yours truly,

HORACE C. WILKINSON,
Assistant Attorney General.

SHERIFFS:—Not entitled to collect fee for serving subpoenas before grand jury where no bill found.

April 28, 1919.

Hon. John L. Moon,
Opelika, Alabama.

Dear Sir:

Replying to your communication of the 22d inst., asking whether fees of the Sheriffs for serving subpoenas before the Grand Jury where no bill is found should be listed or itemized for the service of the subpoenas, or should fall under ex-officio service, I beg to advise as follows:

Code Section 6638, as amended by Acts 1911, page 41, inter alia, provides—"For serving each subpoena or notice fifty cents."

I am, therefore, of the opinion that it is not an ex-officio service and it falls under this classification of fifty cents for the service of subpoenas. An ex-officio service is one where there is no specific provision made in the schedule of fees.

I notice in this connection that the former Attorney General Martin gave an opinion on February 3, 1915, to Hon.

W. H. Murphree, Examiner of Public Accounts, to the same effect. (Biennial Report of the Attorney General, 1914-1916, page 41).

Yours very truly,
J. Q. SMITH,
Attorney General.

CONVICTS:—Hirer pays on basis of number of convicts actually worked each day. Net earnings of each class of convicts should equal average net earnings of same number of men of same class at other mines using convict labor, not including Banner Mine, which is on a different basis.

April 29, 1919.

Mr. C. B. Rogers,
President Convict Board,
Capitol.

Dear Sir:

In Re: *Contract of the State of Alabama with the Montevallo Mining Company.*

In compliance with your request I have examined the contract in question and also the opinion of the Assistant Attorney General, Mr. Fuller, to Mr. Matthews, President of the Board, dated January 14, 1919, and also the brief prepared by Messrs. Percy, Benners & Burr, Attorneys for the Montevallo Mining Company and addressed to Hon. Thos. E. Kilby, Governor, and the Convict Department.

I am of the opinion that the contention of the mining company on the proposition that payment is to be made on the number of convicts actually worked each day during the life of the contract, is correct. I am further of the opinion that it is contemplated by the contract that the net earnings of each class of men employed at Aldridge shall equal the average earnings per man of the same class in other State convict mines. Inasmuch as classification of the convicts is not made for the purpose of determining amount to be paid for their labor at Banner mine, but, at that mine, the State receives so much per ton for coal mined and "such additional sum as may be necessary to give to the Convict Department a net return of \$33.00 per month for each convict employed," including all necessary men about the prison, I am unable to see how, under the Banner con-

tract, the respective earnings of first, second and third class men are to be determined and, therefore, I am unable to see how the Banner mine can be taken into consideration in determining the average earnings per man of other State convict mines. So that, I am of the opinion that in arriving at the average earnings per man you should consider only those mines at which convicts are placed upon the same plan as they are placed at Aldrich; that is, at a rate of so much per man for each of the several classes of convicts as employed at Aldrich.

Yours very truly,

J. Q. SMITH,
Attorney General.

PROHIBITION LAWS; SHERIFFS:—Not necessary to publish fact that no Federal licenses have been taken out.

April 29, 1919.

Hon. Thos E. Kilby,
Governor,
Capitol, City.

My dear Sir::

The Attorney General's office begs to acknowledge receipt of your communication of the 26th inst., asking whether:

“Sheriffs of the various counties of the State are required to publish the fact that no person, firm or corporation has secured United States Revenue License or Stamp Tax under Section 18 of an Act approved January 23, 1915, entitled ‘An Act to further suppress the evils of intemperance,’ etc., when in fact no such licenses have been issued,”

and in reply I beg to advise as follows:

The statute—Section 18, Acts 1915, p. 13—enjoins upon sheriffs the duty of securing monthly from the office of the United States Revenue Collector the names of persons, firms, or corporations who have secured or taken out Internal Revenue Licenses or tax stamps to sell and deal in spirituous or malt liquors, and to publish the lists of such licensees for two successive weeks in some newspaper, etc. The duty here imposed is purely statutory and there is no

duty enjoined to publish and certify the fact that no one has taken out a license.

Yours truly,
J. Q. SMITH,
Attorney General.

WITNESSES: COUNTY DEPOSITORIES:—Witnesses in county courts entitled to fees and milage under section 6659 of Code. Depository may loan money to county and charge interest on same.

April 30, 1919.

Hon. Jos. H. James,
Solicitor,
Greensboro, Ala.

Dear Sir:

Your letter of April 25, propounding certain inquiries to this office was received, and in reply beg to advise as follows:

I am of the opinion that a witness in the county court is entitled to the fees and mileage allowed by section 6659 of the Code. This disposes of your first inquiry.

I am of the opinion that a bank that has been designated Depository of county funds may lawfully lend money to the county and collect interest on such loans, where the transaction is had and done in the way and manner provided by law for the borrowing of money by a county. This disposes of your second inquiry.

Very truly yours,
J. Q. SMITH,
Attorney General.

HEALTH DEPARTMENT: PHYSICIANS:—Certificate may not issue without examination to surgeons in Army or Navy or United States public health and marine hospital service, unless still in such service.

Hon. S. W. Welch,
State Health Officer,
Capitol, City.

April 30, 1919.

My dear Sir:

Replying to your communication of the 29th inst., asking an opinion on the proper interpretation of section 1636 of the Code of Alabama, I beg to advise as follows:

The purpose and the express terms of said section are to permit the issuance without examination of a certificate of qualification to surgeons or assistant surgeons of the United States Army or Navy, or in the United States Public Health and Marine hospital service, provided that such person shall present to the State Board of Medical Examiners a commission or other satisfactory evidence that he is such officer or in such service.

I am of the opinion that it is not sufficient that such officer or person may show to the Board of Medical Examiners that he was formerly, but not at this time, in such service; and in such event the Board would not be justified under the terms of said section in issuing a certificate of qualification without examination.

Very truly yours,
J. Q. SMITH,
Attorney General.

ITALIAN CONSULATE:—May not be searched by local authorities, though consul himself is amenable to criminal laws of State.

April 30, 1919.

Hon. Thos. E. Kilby,
Governor,
Capitol, City.

Dear Sir:

In re: Search of Italian Consulate at Birmingham, I beg to advise as follows:

Consuls do not enjoy the immunities and protection of diplomatic representatives and consequently are amenable to civil and criminal processes of the courts where they reside. (9 R. C. L., p. 161 sec. 8 and cases there cited; 2 C. J. 1305, sec. 29 and cases there cited).

This rule, however, is subject to change when varied and controlled by special and specific treaty obligations; for the United States Constitution, Article 6, provides:

"This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under authority of the United States shall be the supreme law of the

land; and the judges in every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding."

Justice Field speaking for the United States Supreme Court in *Geofray v. Riggs*, 133 U. S. 258 (266) says:

"The treaty power as expressed in the Constitution is in terms *unlimited* except by those restraints which are found in that instrument against the action of the government or its departments and those arising from the nature of the government itself and of that of the States."

Judge Somerville in the case of *Carpigiana vs. Hall*, 172 Ala. 287 (291) says:

"The rights and privileges of consuls rest on the general law of nations *as well as on treaty stipulations*. 2 Opinions of Atty. Gen. U. S. 378."

"By express provision of the federal constitution, a treaty is superior to a state law, and when the provisions of a state statute and a treaty conflict the latter will control, and the application of the statute as to the subject-matter covered by the treaty will be held in abeyance during the existence of the treaty. The rule has been frequently applied in the case of conflicts between treaty and statutory provisions relating to the property rights and disabilities of aliens. A state law is, however, suspended or invalidated only in so far as it contravenes the provisions of the treaty."—38 Cyc. 977.

There is a treaty between the United States and the Italian government entered into May 8, 1878, (20 U. S. Stat. at Large, p. 725) ; Article VI of which reads as follows:

"The consular offices shall be at all times inviolable. The local authorities shall not be allowed to enter them under any pretext, nor shall they in any case examine or sequester the papers therein deposited. These offices, however, shall never serve as places of asylum.

"When the consular officer is engaged in trade, pro-

fessional business, or manufactures, the papers relating to the business of the consulate must be kept separate."

It will thus appear that the treaty stipulations above quoted are controlling of the right of entry and search of the Italian Consulate, but the Consul himself (by the terms of said Treaty Article III) may be arrested and prosecuted for the commission of crimes against the State.

If a consulate *protected by treaty* should in any case be found to be the means of shielding violators of the state law and the consul is guilty of improper and illegal conduct against the laws of the State, the remedy is two-fold, (1) to lodge a request with the Department of the State that his "Exequatur" (permit from this Government) be revoked, and (2) to prosecute the consul himself, for the "inviolability" attaches to the consulate itself and not the consul. By a fiction of law the consulate under the treaty stipulation is Italian territory, but by express stipulation of said Treaty (Art. III) the consul is amenable and answerable to the criminal laws of the State.

I note from the telegram in the file, from the Acting Secretary of State, Hon. Frank L. Polk, that the Department of State at Washington cites said Article VI of the treaty of 1878 above quoted and requests a report of the facts of the case.

I have read over the facts as found by the investigation of Mr. Wilkinson and I do not think the facts of this case would warrant the conclusion that there was intended an "open disregard of treaty obligation" or an "affront to the Italian Government."

I am inclined to the opinion that a report to the Secretary of State setting out the plain facts of the case, coupled perhaps with an expression of regret at the untoward incident will be all sufficient and set the matter at rest.

Very respectfully,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS:—County license inspector not liable for defalcation of Secretary of State's agent collecting chauffeur's license, under Act 1915, page 528.

May 1, 1919.

Hon. W. P. Cobb,
Secretary of State,
Capitol.

My dear Sir:

Your recent communication transmitting to this office a letter to the Governor from Mr. C. W. Austin, of Birmingham, asking an opinion of the Attorney General's office as to the liability, *vel non*, of the license inspector of Jefferson County for the default and delinquency of one, W. C. Shirley, in failing to return the sum of \$2,000.00 collected for chauffeurs' license in said county, was duly received by this office and I beg to advise you as follows:

The license inspector is appointed by the State Board of Equalization pursuant to Section 6 of an Act entitled, "An Act to prescribe and fix licenses, etc.," Acts 1915, page 489, (528), the duties and functions of said license inspector are specified and set forth in said Section 6, and for the faithful performance of said duties the statute requires that he give a bond.

The chauffeur's license and the machinery provided for its issuance and collection is to be found in Section 23 of an Act entitled, "An Act providing for the registration, licensing, identification and regulation of motor vehicles," Acts 1911, page 634 (643), wherein it is provided (*inter alia*) that application for license as a chauffeur shall be made "to the Secretary of State or his duly authorized agent." This Section provides that the applicant shall accompany this application with the fee of \$5.00, and it is this fee, I assume, that is involved in the matter of indictment of Mr. Shirley.

The license inspector's bond covers the faithful performance of his duties, and whatever duties are imposed under the statute are impliedly under the law read into the bond, but his functions are foreign to and have nothing to do with the collection of the \$5.00 fee for chauffeur's license; that is a matter that is collected through the office of Secretary of State, either by him or his duly authorized agent.

It would, therefore, appear that the bond of the license inspector inquired about in Mr. C. W. Austin's letter, would

not be liable for the default of the agent of the Secretary of State.

I am not called upon at this time to pass upon the liability of the Secretary of State, as that is a matter aside from the present inquiry.

Yours very truly,

J. Q. SMITH,
Attorney General.

DEPARTMENTAL EXPENSE:—A typewriter is a "necessary incidental expense."

May 2, 1919.

Hon. C. B. Smith,
Commissioner of Insurance,
Capitol.

Dear Sir:

Replying to your letter of May 1, 1919, asking of this office whether under Section 5 of an Act approved August 31, 1909, entitled,

"An Act to provide for the investigation of fires and to define the duties and powers of certain officers relating thereto, and to provide means for paying expenses incurred under the provisions of this Act."

the purchase of a typewriter needful and necessary in the performance of the duties prescribed by said act is such necessary incidental expense, as is provided for under the terms of Section 5 of said act, I beg to advise that in my opinion under the modern methods of transacting business, a typewriter is as much a necessary part of the furniture as desks and chairs, and I think it would be held to be a "necessary incidental expense."

Very truly yours,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS; SCHOOL SYSTEM:—Filling vacancy on county board of education caused by removal of member from county.

May 3, 1919.

Hon. C. A. L. Samford,
Solicitor,
Opelika, Alabama.

Dear Sir:

In regard to your communication of the 30th ult., I beg to advise as follows:

By the terms of an Act, entitled "An Act providing for the County Board of Education," &c. (Acts 1915, p. 281, et seq.), it is provided, *inter alia*; Section 1, That the public schools of the several counties of the State (except those in incorporated cities and towns) shall be under the immediate control of a County Board of Education. Said County Board of Education shall be elected by the qualified electors of the county.

The function and duty of this Board, elected by the electors of each county, as provided in said Act, is to supervise and control within their respective counties, and the members are county officers. Code Section 1556 provides, that "any office in this State is vacated (1) by death of incumbent, (2) by his resignation, except in such cases as are excepted by law, (3) *by ceasing to be a resident of the State or of the division, district, circuit, or county for which he was elected or appointed.*

It would thus appear that by ceasing to be a resident of the county, said office *ipso facto*, becomes vacated.

By Section 6, Subdivision 3, of said Act (Acts 1915, p. 282) it is provided that *the County Board of Education shall have power to* "(3) elect to hold office until the next regular election, as provided under this Section, the successor of any member of the County Board of Education whose place may have become vacated by death, resignation, *or other cause*; provided that in case the County Board fails for a period of thirty days to fill said vacancy, the State Superintendent of Education shall have the authority to appoint a member to fill the same."

I am, therefore, of the opinion that the County Board of Education may elect the successor to the member who has vacated by removal from the county, such successor to hold office until the next general election, as provided by the terms of said Section 6.

The Acts of the Board would be in all things valid and the acts of such newly elected officer would be valid as to any function he might perform as a *de facto* officer if not a *de jure* (see Code Section 1473); but I am of the opinion, that he would be a *de jure* officer.

In the event, such appointee's right and title to the office were questioned, the same would be settled by quo warranto proceedings, if desired.

Yours very truly,

J. Q. SMITH,
Attorney General.

DEPARTMENTAL EXPENSE:—Incoming Governor may approve expenses which the former Governor had declined to approve.

May 6, 1919.

Hon. Thos. E. Kilby,
Governor,
Capitol.

Dear Sir:

The accompanying expense accounts of the Attorney General's office covering expenses incurred during the term of Hon. William L. Martin were referred to me by Attorney General Smith several days ago with the request that I advise you as to the legality of the several items of the account, and as to your authority to approve them for payment.

I have examined the accounts and find that the authority to incur the expense which they cover is found in that provision of section 6 of the Attorney General's Act approved Sept. 22, 1915, which provides that:

"The Attorney General is authorized to incur such expenses as may be necessary in the investigation of violations of the criminal law, in the prosecution of crime and in the conduct, investigation and prosecution of any civil cause in which the State is interested or the State's revenue involved."

I can think of only two possible reasons why you have not the authority to approve the accounts for payment, (1)

because they cover expenses incurred under a former administration, (2) because their payment was declined by your predecessor.

The first of these reasons is clearly without merit, because the duty of approving the account attaches to the office and not to the person occupying the office. A large part of the expenses approved for payment by an incoming Governor during the first weeks of his administration covers expenses incurred during the former administration.

The other reason is equally without merit. Irrespective of whether payment has ever, in fact, been declined, your predecessor might have declined the payment of the accounts when presented to him on one occasion, but this would not have prevented him from approving their payment at a later date, if he changed his mind in the premises. It follows then, I think, that if he could have withdrawn his objection and approved the accounts for payment after having once declined their payment, there is no reason why his successor should not approve them for payment, in the event he differs from his predecessor as to the advisability of their payment, that is as to the expenditures being for the public good.

Under the construction placed upon the Attorney General's Act of 1915 by the Supreme Court in the case of *State ex rel Daly v. Henderson*, 74 Sou. 951, it was not the purpose of the Legislature in passing the act to require the Governor to inquire as to the correctness or honesty of the items of service or expenditure, but that duty fell to the Attorney General, but it was intended to give the Governor authority in approving or disapproving an account to express or withhold his commendation and judgment as to the expenditure being for the public good.

I am, therefore, of opinion that if in your judgment the expenditures in question were for the public good, you are authorized to approve their payment.

Yours truly,

L. E. BROWN,
Assistant Attorney General.

DEPARTMENTAL EXPENSE:—Expenses of Fertilizer Sampler, if properly incurred, may be approved even though the Sampler resides in another part of the city where the expenses were incurred.

May 6, 1919.

Hon. M. C. Allgood,
Commissioner of Agriculture and Industries,
Capitol.

Dear Sir:

Replying to your letter of May 5, asking for an opinion from this office if it would be legal for you to approve an account of a fertilizer inspector for his meals or dinners when he is working in the City of Birmingham, where the inspector resides in East Lake, a part of greater Birmingham.

As I understand it, fertilizer samplers are appointed by you under authority of an Act approved September 22, 1915, found on page 646, of the Acts of that year, the provision for their compensation being the following:

“Samplers to be paid out of any moneys in the treasury to the credit of the Department of Agriculture and Industries, their salaries to be \$1500.00 per annum, and their expenses, payable monthly, shall be verified by affidavit and approved by the Commissioner of Agriculture and Industries.”

It being the duty of the Commissioner of Agriculture and Industries to pass upon and approve the expense account of the sampler, I am of the opinion that it becomes your duty to pass upon the expenses incurred by the sampler and if in your judgment the meals or dinners charged up by the sampler, are such expenses as should properly be incurred, you are authorized to approve the account for payment.

Yours very truly,

J. Q. SMITH,
Attorney General.

LICENSES:—Only one license required for a partnership and its employees for selling talking machines.

May 7, 1919.

Hon. A. H. Moody,
Judge of Probate,
Scottsboro, Alabama.

Dear Sir:

Replying to your letter of May 6, beg to advise that Sub-division 4, Section 1, of the License Act of 1915 should be construed as though it read:

“Each person, firm or corporation engaged in the business of selling, etc.”

so that only one license is required for a partnership and where a partnership takes out the license they can use as many employees as they see fit in carrying on the business covered by the license, and can send their employees out in wagons to sell and deliver machines.

Yours very truly,

J. Q. SMITH,
Attorney General.

TAXATION:—Taxes paid on interest-bearing warrants should be refunded under sections 2340 to 2347 of Code of 1907.

May 14, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

Replying to your request for advice as to the refund of taxes paid on interest bearing county warrants, beg to advise that—

Under the last ruling of this office, interest bearing county warrants for counties in this State, are free from taxation and where taxes have been erroneously paid thereon, the taxes paid are subject to refund under Article 16 of the Political Code, Sections 2340 to 2347 inclusive.

I am enclosing, herewith, the application for refund of B. J. Lindsay, Sr., which you left with me. This applica-

tion says that the taxes in question were subject to refund under provisions of the Revenue Act of 1915, found on pages 469, 470 and 471 of the Acts of that year. In this the petitioner is mistaken, as these provisions apply to erroneous sales of real estate. The refund in question, as above stated, should properly be made under the Code Section to which we have referred.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

DEPARTMENTAL EXPENSE:—Office supplies not on contract may be purchased as other supplies under Act of 1919 creating Board of Control and Economy.

May 14, 1919.

Mr. W. D. Nesbitt, Chairman,
State Board of Control and Economy,
Capitol, City.

Dear Sir:

In reply to your inquiry of May 6, asking if leather index tabs needed by you can be purchased under the existing contract which Marshall-Bruce Company has with the State?

The Marshall-Bruce Company contract covers certain specific articles only, and leather index tabs not being included among the articles enumerated in said contract, the same are not purchasable thereunder.

Section 69 of the State Constitution provides that "all stationery, printing, paper and fuel used in the legislative and other departments of Government, shall be furnished under contract to be given to the lowest responsible bidder below a maximum price and under such regulations as may be prescribed by law." To put the provisions of this Act in operation the Legislature adopted Section 578 of the Code, making it the duty of the Secretary of State to make contracts, with the approval of the Governor and the Treasurer, for the purchase of the items mentioned in Section 69 of the Constitution, under authority of which Code Section the present Marshall-Bruce contract was entered into.

The leather index tabs in question appear to come under the head of office supplies, and as such are not covered by

the provisions of Section 69 of the Constitution, requiring certain items to be purchased under the contract given to the lowest responsible bidder below a maximum price. Under this interpretation you are authorized to purchase such supplies in the same manner as you are authorized to purchase other supplies for the several departments of the State Government, in accordance with the provisions of the Act creating the State Board of Control and Economy, and when purchased they should be paid for as other supplies purchased under authority of this Act, to be paid for under the general appropriation provision contained in said act.

Yours very truly,
J. Q. SMITH,
Attorney General.

TAXATION:—Property of Volunteers of America exempt if used only for charitable, religious, or educational purposes, even though some charge is made, when all income is used to help defray expenses.

May 14, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

Replying to your inquiry as to exemption claimed by the Volunteers of America upon certain property located in Jefferson County, beg to advise that—

If this property is used exclusively for religious worship, or purely charitable or fraternal purposes, it is entitled to exemption from taxation. How this is depends upon the facts in each particular case. From a consideration of these facts the local board in each case should be able to determine whether or not the property is in fact used for charitable, religious or educational purposes. An incidental use which does not interrupt the exclusive occupation of the property for purposes of charity, but assists in securing this purpose does not impair the claim to exemption. Such incidents might be the use of school property for the housing of teachers; the acceptance of pay from patients in a charity hospital who are able to pay, provided

such income be used for the general conduct of the institution; the receipt of pay from young women who live in institutions of the character of those provided by the Young Women's Christian Association, the object of which is the improvement of the temporal, moral and religious welfare of young women obliged to earn their own support, such income to be used in defraying the expenses of the institution.

Along with these go the use of property by the Salvation Army for the housing of unfortunates, where compensation is accepted from those whom it serves who are able to pay, and the income used to aid in defraying the expenses of the institution.

Guided by these statements the local board will, no doubt, have no trouble in determining whether or not the property in question is subject to taxation or not. I have no doubt it is being used as the Salvation Army is using property all over the country; that is, for the purpose of aiding and helping unfortunates, at the same time charging any of them where they are able to pay something for the benefits which they receive, the income being used to defray the expenses of the institution which it maintains. If this is the case, it will be clearly entitled to exemption in line with the statements herein contained.

Yours very truly,
J. Q. SMITH,
Attorney General.

INSURANCE:—Corporations may establish sick and accident benefit funds for their employees.

May 14, 1919.

Hon. C. B. Smith,
Commissioner of Insurance,
Capitol, City.

Dear Sir:

Replying to your inquiry as to whether industrial or manufacturing corporations violate the insurance laws by establishing a sick or accident benefit fund for their employees, collecting therefor a certain monthly amount, I beg to advise as follows:

In the case of United States Cast Iron Pipe & Foundry Company v. Bailey, 194 Ala. 261 (69 So. 825), our Supreme Court says:

"A corporation other than an insurance company may do an insurance business as an incident to its general business, if the insurance is not contrary to the express terms of incorporation, and provided such insurance is for the protection of its properties, materials, works, machinery, plant, or employees used and engaged in the conduct of the corporate business. Sales-Davis Co. v. Henderson-Boyd Lumber Company, 69 So. 527."

The effect and meaning of this holding is that corporations have the power to conserve their own employees and properties by and through the means and instrumentality of sick or accident benefits; in other words, such powers are held to be incidental or implied, unless expressly interdicted by charter provisions. Consonant with this idea might be cited also the cases of Harrison v. Ala. Midland Ry. Co., 144 Ala. 247; U. S. Cast Iron Pipe & Foundry Co. v. Bragg, 156 Ala. 522.

The holding in Bailey's case, *supra*, is sustained by authority. The rule is expressed in Cyc. 1143, as follows:

"Railroad Companies have the implied power, as incident to their power to employ labor and to render compensation therefor, to establish by levying assessments upon the wages of their employees in pursuance of contracts made with them, a fund for the relief of such employees when sick or wounded, and to assume the management of the funds so raised, to erect and maintain therewith hospitals wherein to treat such sick and wounded employees and to make additional contributions thereto out of their corporate funds."

I am, therefore, of the opinion that so long as the corporation confines its activities to the benefits to be paid to its own employees, not undertaking to insure outsiders, such insurance benefits may be said to be one of the inci-

dental or implied powers, and may be freely exercised in the absence of any express charter prohibition.

Very truly yours,

RICHARD EVANS,
Assistant Attorney General.

MEMORIAL COMMISSION; ACCOUNTING:—Funds appropriated for Commission may be paid to a properly elected treasurer, upon his making bond, to be expended by him under rules adopted by Commission.

May 15, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

You ask for an opinion as to your authority to issue a warrant for two thousand dollars on the ten thousand dollars appropriated and made immediately available under the Alabama Memorial Commission Act, to be used by the commission for the purpose of carrying out the campaign for contributions toward the Memorial which the commission has in view.

In reply I beg to advise that the act approved February 17, 1919 (Acts 1919, p. 145) in reference to vouchers for traveling expenses, does not apply to expenditures made under the Alabama Memorial Commission Act (Acts, 1919, p. 18).

The payment of the expenses of the Memorial Commission, like the expenses of the Department of Agriculture and Industries, referred to in an opinion to you of February 26, 1919, does not come within the operation of the recent act requiring vouchers for traveling expenses. Further, I beg to advise that, like the appropriation for the State Board of Health, under Section 733 of the Code, the appropriation of \$10,000.00 is payable to the Memorial Commission in such sums as the Governor may determine from time to time to be needed for the work.

The Memorial Commission Act provides that in order to safeguard its funds, the executive Secretary and Treasurer of the Commission shall be required to give bond in

some surety company in such sum and otherwise conditioned as the commission may determine. The act does not provide specifically for a treasurer of the commission, but does empower the commission to adopt necessary rules for its guidance and for the execution of its power, and requires it to effect an organization, and the fact that it requires the treasurer to give bond shows that it was contemplated that it should have a treasurer.

Section 612 of the Code has no application to the paying of funds appropriated by the Legislature, as is the ten thousand dollars in question. *White, Auditor v. Smith*, 117 Ala. 232.

I am of the opinion that when you find from an examination of the records of the Memorial Commission that it has properly elected a treasurer charged with the duty of receiving and paying out the funds of the commissions, and that the necessary bonds which he and the secretary are required to give have been properly executed and approved, you will be authorized to draw warrants payable to the said treasurer from the sums indicated by the commission's requisition properly approved. Of course, the treasurer of the commission will be liable on his bond for the safe keeping and proper paying out of the funds that come into his hands. The Legislature evidently had in mind that the public interest would be sufficiently safeguarded by the placing of the Secretary and Treasurer under bond and by the commission adopting such rules and regulations for the paying out of moneys which come into its hands as business experience causes them to deem necessary or advisable.

It is proper to say that this Memorial Commission Act comes under the influence of the Act to create a State Board of Control and Economy. The latter act was enacted after the Memorial Commission Act.

Yours very truly,

L. E. BROWN,
Assistant Attorney General.

PRINTING AND DISTRIBUTION:—Act approved February 13, 1919, does not repeal subsection 8 of section 578 of Code of 1907, and Secretary of State is still required to pass on the compliance with contracts.

May 16, 1919.

Hon. Wm. P. Cobb,
Secretary of State,
Capitol.

Dear Sir:

In reply to your communication of the 15th inst., asking whether Paragraph 8 of Code Section 578 is repealed by an Act entitled an act to create a State Board of Control and Economy, &c., approved February 13, 1919 (Acts 1919, p. 43) in so far as said Paragraph or Subsection 8 requires the Secretary of State to pass upon the compliance of contracts referred to in said paragraph, I beg to advise:

Section 21 of said act approved February 13, 1919 (Acts 1919, p. 48) provides that:

“This act is not intended to repeal Sections 8 and 9 of an act approved September 10, 1915 (Acts 1915, p. 371, 373), in reference to the printing and binding of any supplies or publications desired by the head of any office or Department but this act is intended to be a substitute for said act in so far as the purchasing agent is provided for therein,” &c.

Sections 8 and 9 above referred to (Acts 1915, p. 373) provide, inter alia, that Code Chapter 40 is not repealed and that “nothing herein contained shall affect any contract now existing and legally entered into.” Chapter 40, *supra*, refers to public printing and embraces Code Sections 1647-1677 (both inclusive) and is enacted as supplementing legislation carrying out Section 69 Constitution, (which was held not to be self-executing, *Brown v. Seay*, 86 Ala. 122). Besides the duties enjoined in said chapter 40, said subsection 8 of Section 578 require you to “pass upon the compliance of any contract made in pursuance of this section,” and if you shall find the “compliance” to conform to the terms and stipulations of the contract, then that you shall certify such fact together with the amount due on said contract to the Auditor, &c.

I do not think there is anything Subsection 8 of Code Section 578 inconsistent with other statutory requirements and therefore it remains of force and effect, and I think it is in consequence your duty to pass upon the compliance of the contracts contemplated in said subsection and if found correctly complied with make the certification therein provided for.

Very respectfully,

RICHARD EVANS,
Assistant Attorney General.

COUNTY COURTS:—Probate judge should collect one dollar for issuing affidavit and warrant of arrest and pay same into the county treasury.

May 19, 1919.

Hon. G. W. Weaver,
Judge of Probate,
Columbiana, Alabama.

My dear Sir:

In your letter of the 9th instant in which you ask whether as Judge of the County Court you would be justified in charging a fee of \$1.00 for issuing an affidavit and warrant of arrest. I beg to advise as follows:

Pursuant to Acts 1915, page 862, re-establishing County Courts, Section 2 thereof provides, *inter alia*, that said courts "shall be governed by all the provisions of Art. 3, of Chapter 198, of the Code, except as otherwise prescribed by this Act."

By reference to said Art. 3, Chapter 198, Code Sections 6696 and 6697, the probate judge's duty with reference to reporting fees attached to the office of judge of the County Court and the giving of a bond to pay sums collected into the County Treasury are set forth.

Acts 1915, page 603, provides that all fees allowed in the County Court by Code Sections 6655 and 6656, or other provisions of law, are required to be paid into the County Treasury as collected, and Section 2 of this Act, puts judges of County Courts of counties of certain population, on salaries in lieu of fees.

Code Section 6655 (referred to in said Acts 1915, page 603) provides "For taking affidavit of complainant and issuing warrant of arrest \$1.00."

I, therefore, am of the opinion that for such service of taking affidavit of complainant and issuing warrant of arrest, you should charge \$1.00 and that such sum collected for such service should be paid into the County Treasury.

Very respectfully,

J. Q. SMITH,
Attorney General.

CONVICTS; SENTENCES.—Code section 7092 being modified by section 7620, where the jury attempts to fix punishment at one year in the penitentiary the trial judge may alter the sentence to one year at hard labor for the county.

May 19, 1919.

Hon. G. C. Walker,
County Solicitor,
Clanton, Alabama.

Dear Sir:

Your communication to this office in re Alfred Bevis, has been received and I beg to advise as follows:

Bevis having been convicted of manslaughter in the first degree and his punishment fixed by the jury, under Code Section 7092 at one year in the penitentiary, I am of the opinion that the sentence imposed by the trial judge; to-wit one year hard labor for the county, was correct. See Robinson's case 6 Ala. App. 13 (60 So. 558); Phillip's case, 11 Ala. App. 15 (65 So. 444).

You will observe from these cases that Code Section 7092 is held to be modified and controlled by Section 7620. In Robinson's case the court observes:

"A result of the modification being to deprive the jury of the right on a conviction of manslaughter in the first degree, to fix defendants' punishment at imprisonment in the penitentiary for a term of one year," &c.

It follows that the sentence to hard labor for the county being regular and proper the Clerk should issue to State

witnesses their certificates, good against the Fine and Forfeiture Fund, pursuant to Code Sections 6660 and 6666.

Very respectfully,

J. Q. SMITH,
Attorney General.

CONVICTS; JAILS:—Necessary guards should be appointed by the sheriff and payment for their services is a claim against the county.

May 21, 1919.

Dr. Glenn Andrews,
State Prison Inspector,
Capitol.

Dear Sir:

Referring to that part of the opinion of date, July 25, 1916, found on page 381 of the Attorney General's Biennial Report 1914-1916, which refers to watchmen of jails, you have asked the advice of this office as to what course should be pursued where necessary guards are not furnished the jails, and where, in your judgment, there should be such guards.

I beg to advise that inasmuch as the legal custody and charge of the jails is placed in the hands of the sheriffs of the several counties, Code Section, Sec. 7191, the duty is imposed upon them to select and appoint the necessary guards and the claim for the services of the guards should be presented to the fiscal court of the county and, as indicated in the opinion above referred to, it becomes the duty of that court to see that the expenses are properly allowed as a claim against the county. And where the court refuses to allow the claim an appeal will be necessary.

Yours very truly,

J. Q. SMITH,
Attorney General.

PROHIBITION LAWS:—Arrests may be made without warrant, appliances summarily destroyed, and lands condemned.

May 21, 1919.

Hon. C. E. Cox,
Sheriff Clarke County,
Grove Hill, Alabama.

Dear Sir:

Your letter addressed to this office has been received, and in reply thereto I beg to say I see no reason why land should not be sold under condemnation proceedings where a still was found thereon, even though search was made without a search warrant.

Illicit distilling is made a felony under the Bone Dry Law and under Section 6269 of the Code, an officer has a right to arrest without a warrant if he has reasonable cause to believe that a felony has been committed and that the person arrested committed it.

Section 12 of the Bone Dry Law (Acts 1919, p. 12) makes all appliances which have been used or are ready to be used for the purpose of distilling contraband, and provides that no person, firm or corporation shall have any property rights in or to the same; and further provides, that when such appliances are found by the sheriff in his effort to enforce the law, the same shall be at once summarily destroyed.

I, therefore, advise you that if you have proper cause to believe that the offense of distilling has been committed in your county, that you have the right to make an arrest therefor without warrant and that you have a right to seize and destroy summarily all appliances which have been used or are ready to be used for making liquor.

Yours very truly,

J. Q. SMITH,
Attorney General.

SCHOOL SYSTEM:—No provision is found for payment of compensation to county treasurer of school funds.

May 21, 1919.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

In reply to your inquiry of April 21, requesting an opinion of this office on the authority of county boards of education to allow compensation to county treasurers of public school funds employed under the provisions of the Act approved April 18, 1911, to provide for the office of county treasurer of public school funds (Acts of 1911, p. 498), I beg to advise that neither in this Act nor elsewhere do I find any authority for the county boards of education paying such treasurers anything as compensation for their services. The presumption is that they should serve without compensation, and in the absence of some provision authorizing an allowance or compensation to these treasurers, I must advise that, in my opinion, the county boards of education are without authority to allow any compensation to such officers.

Yours very truly,
J. Q. SMITH,
Attorney General.

DEPARTMENTAL EXPENSE:—Traveling expenses of detectives of insurance department are paid on statements made under provisions of Act approved February 17, 1919.

May 21, 1919.

Hon. Brooks Smith,
Commissioner of Insurance,
Capitol.

Dear Sir:

In reply to your request of May 20, for an opinion on the question of whether the Act approved February 17, 1919, (Acts 1919, p. 145) is applicable to detectives sent out by your Department to investigate fires, I beg to advise that the act you refer to relating to vouchers for traveling expenses applies to the payment of all traveling expenses

that are paid out of the State Treasury on warrants approved by the Auditor. As I understand it, the expenses of the detectives in question are paid in this manner, and this being the case, I think the act in question is applicable to these employees, notwithstanding, as you say, they are paid out of a special fund collected from the insurance companies for the support of your Department.

Yours very truly,
RICHARD EVANS,
Assistant Attorney General.

COUNTY EXPENSE:—Tax assessor is entitled to \$100 for making new plat book only when a new one is necessary.

May 22, 1919.

Mr. W. E. Harrison,
Tax Assessor,
Columbiana, Alabama.

Dear Sir:

I beg leave to acknowledge receipt of your letter of May 17, in which you ask to be advised as to whether or not as Tax Assessor you are entitled to \$100.00 per year for making a plat book, as provided in the Acts of the Legislature of 1915, Section 56, page 411.

I am of the opinion that the intention of the law is that, if when you went into office there was no plat book then you should proceed to make same, for which you are entitled to compensation of \$100.00. I am of the opinion from the reading of Section 56 and Section 71, page 415, that the intention of the Legislature was to have a plat book made for the term of four years. It is not reasonable to say that the Legislature should intend that a plat book be made each year after once having been made. It seems to me it would be very little trouble for you to note the transfers that have been made during the year.

I am, therefore, of the opinion and so advise, that you are not entitled to \$100.00 each year for making said plat book.

Very truly yours,
J. Q. SMITH,
Attorney General.

SCHOOLS; ELECTIONS:—Upon written request from the county board of education, the Commissioners Court may hold special meeting to call election on district three-mill tax.

May 23, 1919.

Hon. John T. Heffin,
Judge of Probate,
Randolph County,
Wedowee, Alabama.

My dear Sir:

Your communication of the 29 ultimo addressed to this office and in reply beg to advise as follows:

If the County Board of Education has made a request of the County Commissioners as provided in Section 1 of an Act, entitled "An Act to provide for elections, to authorize any county in the State and any school district now existing or hereafter formed in any county, to levy and collect a special county tax," etc. (Acts 1915, p. 360) to order an election to determine whether a special tax shall be levied for school purposes in the district, I think you would not only be justified, but it would be your duty to call a special term of the Commissioners' Court for said County, as provided for by Code Section 3311. In this connection, please see

Walker v. State, 12 Ala. App. 229.

Thames v. State, Id. 307 (309).

In the former case the court said in interpreting the clause of Section 3311, any "special duty" required by law to be performed as follows:

"The 'special duty' referred to in the statute (Section 3311) imports no more, in the use of this expression than to distinguish the duties that may be performed at such a term from those general duties to be performed at regular terms that are declared by the law as relating to the routine business of the Commissioners' Court as set out and provided for in Chapter 65 of the Code of 1907, which embraces the section conferring this authority to hold special terms for the performance of other duties. The matter of providing for the hiring of county convicts is a duty imposed upon courts of county commissioners of each of

the counties in the State, by the Act of the Legislature approved November 30, 1907, to be found on pages 422 et seq., of the Criminal Code of 1907. This is a special duty imposed on the Commissioners' Court as distinguished from those general duties in the transaction of the regular and routine business of the court that are provided for in Chapter 65 of the Code, and the contention of the petitioner that the order of the court authorizing making the contract of hire, under which he is held is void because made at a special term cannot be upheld. See, also *Joe F. Thames v. State*, *Infra*, 68 South, 474."

In the *Thames* case, *supra*, the court said:

"The second contention—that is, that the contract of hire between the county and the Horseshoe Lumber Company under which appellant is held is void—is founded upon the fact that the contract was authorized at a special and not at a regular session of the Commissioners' court of the county. In support of the contention, we are cited to the case of *Wightman v. Karsner*, 20 Ala. 446 where it was held that the commissioners' court of a county has no power to hold special terms, except in cases expressly authorized by law, and that all orders—for instance, one auditing and approving an account against the county—are *coram non judice* and void.

"Since this decision, section 3311 of the Code, was enacted, providing that in cases where officers are to be appointed, or vacancies supplied, or *any other special duty required by the law to be performed*, a special term must be held:' and we are of opinion that the hiring out or disposition of the county convicts, which is a duty imposed by law upon such court (Code 1907, vol. 3, p. 422), is in its nature such as to be a special duty within the contemplation and meaning of the statute.

"It follows that the lower court did not err in denying the petitioner a discharge, and he is hereby ordered that its judgment be affirmed, and that the prisoner be and is remanded to the custody of the proper authorities for the serving out of his sentence."

If demand is made upon the Commissioners' Court, as provided by said Section 1, (Acts 1915, p. 360), the duty is imposed by law as a duty with reference to the calling of said election and would be proper and sufficient authorization and justification for calling a special term of the Commissioners' Court. This assumes, of course, that Randolph County is one of the counties imposing the three mill tax, otherwise, the district three mill tax would have no field of operation. Of course, you should be careful to let your minutes show that written demand was filed with the Commissioners' Court by said Board of Education, requesting the County Commissioners to order an election, and the other requirements with reference to the ten days' notice or posting, as specified in said Section 3311 and said Acts 1915, page 360, should be in all things carefully complied with and affirmatively show such compliance which would be jurisdictional matter when calling a special term.

I am of the opinion that a special election may be called pursuant to statute, upon compliance with statutory requirements and be as valid if complied with, as if ordered at a general term of the Commissioners' Court.

Yours very truly,

L. E. BROWN,
Assistant Attorney General.

COUNTY BONDS; TAXATION:—Winston County may levy a special tax to provide for interest and sinking fund on bonds issued before adoption of Constitution of 1901, though such special tax may amount to more than one-fourth of one per cent.

May 28, 1919.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol, City.

Dear Sir:

In reply to your communication of the 20th inst., I beg to advise as follows:

I have examined the statutes authorizing and empowering the county of Winston to issue bonds (for bridges and public buildings) not to exceed \$25,000.00, being an act approved Dec. 10, 1900, (Acts 1900-1901, p. 286), and the

act amendatory thereof approved Feb. 27, 1901, (Acts of 1900-1901, p. 1323 et seq). Section 5 of said last mentioned act provides inter alia as follows:

The county commissioners of said county are authorized and empowered to levy a special tax each year on all the taxable property of said county sufficient to pay the interest on said bonds as it becomes due, and to provide a sinking fund with which to pay the principal of said bonds at maturity, and it shall be their duty to levy such special tax so long as any of said bonds and interest coupons shall remain outstanding and unpaid, and such tax when collected and paid over to him, the treasurer of said county, shall be set aside to be used exclusively for the payment of bonds and said coupons as they shall fall due and are presented."

The statutes providing for this special tax were authorized under the Constitution of 1875; Section 5 of Article 11 of which reads as follows:

"No county in this State shall have authority to levy a larger rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum. * * * Provided further that to pay any debt or liability now existing against any county, incurred for the erection of the necessary public buildings or other ordinary county purposes, or that may hereafter be created for the erection of necessary public buildings or bridges, any county may levy and collect such special taxes as may have been or *may hereafter be authorized by law* which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

This provision of the Constitution of 1875 finds its counterpart in section 215 of the Constitution of 1901, reading as follows:

"No county in this State shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum. * * * Provided further, that to pay any debt or liability now existing against any county

incurred for the erection, construction or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges or roads any county may levy and collect *such special taxes not to exceed one-fourth of one per centum* as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

It will be observed that the Constitution of 1875 carried no limitation upon the amount of special taxes a county might levy for bridges or necessary public buildings, whereas, the Constitution of 1901, did limit such tax to one-fourth of one per centum. The question then arises, Does the constitutional limitation of one-fourth of one per centum apply to bonds for bridges and necessary public buildings issued prior to the present Constitution; or in other words, assuming a contract between the county commissioners consonant with and pursuant to the statutes aforementioned, can the contract obligation be impaired by a subsequent constitutional limitation in reduction of the amount of the special tax authorized by law at the time of the issuance of the bonds.

In the case of Board of Revenue, Shelby County vs. Farson Son & Co., 197 Ala. 365 (380); 72 So. 613 (615) our Supreme Court remarks:

"It is insisted that this cannot be done upon the theory that it would take away the power to enforce the contract, and therefore, by subsequent legislation, as it were, impair the obligation of the contract, contrary to the provisions of the federal and State Constitutions. We are of the opinion that this insistence is well supported by the authorities. In the case of Port of Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620, is the following language: 'Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the Legislature or if they are changed, a substantial equivalent must be provided. Where the resources for the payment of the bonds of a municipal

corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void.

"The case of *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L. Ed. 403, is referred to as the leading case upon this question among the federal authorities. The following from the opinion is of interest in this connection: 'When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there is nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other.'

"The principles above announced have found frequent reiteration in the following, among other cases: *Wolff v. New Orleans*, 103 U. S., 358, 26 L. Ed. 359; *U. S. v. New Orleans*, 98 U. S., 381, 25 L. Ed. 225; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090. The same principle was fully recognized by this

court in *Coms. Ct. v. Rather*, 48 Ala. 433, where it was said: 'It is now the fixed and well settled law of this country, that the law in force at the time a contract is entered into becomes a part of it, both as to its stipulations and also as to the remedy, which may be resorted to, to carry the stipulations into effect. And neither the law governing the stipulations nor the remedy can be so altered after the execution of the contract as to impair any rights, whether of remedy or otherwise, which grew out of the contract on the day it was made. The obligation of a contract extends not only to the stipulations, which the parties have agreed upon, but to the rights belonging to the remedy on the day the contract bears date. The mode of enforcement, the practice, may be altered, but not so as to impair the rights of the parties under the contract, as they existed at the date of its execution.'

It matters not that the restriction or limitation imposed upon the amount of the special tax was by constitutional provision rather than by statute.

The Supreme Court of the United States in *County of Moultrie v. Rockingham Ten Cent Savings Bank*, 92 U. S., 631 (23 L. Ed. 631) says:

"The power thus granted was never revoked, unless it was by the new Constitution of the State, which did not take effect prior to July 2, 1870. Whatever was done in pursuance of the power before that time, if anything was, could not be affected by the Constitution subsequently adopted. Subscriptions, or contracts to subscribe, made in pursuance of it before it was abrogated, remained binding; for a constitution can no more impair the obligation of a contract than ordinary legislation can."

See also 12 C. J. 988, Sec. 595, citing numerous Federal authorities.

Also 11 Cyc., p. 577, N. 95, with authorities therein cited.

It would, therefore, follow that the unrestricted taxing power resident in counties under the Constitution of 1875 remains inviolate and unimpaired as applied to the bonds in question, and if the levy of one-fourth of one per cent

as authorized by Section 215, of the Constitution of 1901, be not sufficient, then such limitation is not an insuperable barrier and the county commissioners of Winston County not only can, but must under the law, levy a special tax in excess of this amount that may be reasonably adequate to meet the contractual obligations entered into and consonant with the law of force at the time of the issuance of said bonds—providing both for interest and a sinking fund for retirement.

I, therefore, conclude and so advise you that the county has the authority:

1. To levy a tax of 5 mills for general county purposes.

2. To levy a tax for the special purpose of meeting debts incurred for bridges or necessary public buildings of one-fourth of one per cent, and

If such special levy of one-fourth of one per cent to meet obligations incurred for the erection and maintenance of bridges and necessary public buildings be not sufficient to provide revenue wherewith to meet interest on the said bonds, or to establish a sinking fund against the day of maturity of said bonds, *then*

3. To levy in addition a special tax in such reasonable amount as will reasonably provide for said interest and establish a sinking fund as was provided by statute and contracted thereunto by the county commissioners, (for the law of force at time of the contract enters into and forms part thereof).

I am further of the opinion that should the county authorities fail or refuse to perform these duties that mandamus would lie to compel the levy of such special tax—the duty in this behalf is not discretionary, it is mandatory under Section 5 of the Act supra—

In Farson's case, *supra*, the court said:

“It is insisted that the question of levying the special tax and of the purpose for which the same shall be applied is a matter resting in the discretion of the board of revenue or commissioners' court, and cannot be controlled by the writ of mandamus. We are of the opinion, however, that as the commissioners' court

had full power to enter into the contract and agree to levy this special tax for this particular purpose, and that as such agreement is valid and binding and a most material part of the contract, it became the legal duty of the court to levy the tax and have the money so collected appropriated to the purpose for which it was pledged. The contract being binding, the question passed beyond the field of discretion and became one of plain duty to carry out the agreement solemnly made."

The amount necessary to be raised is one of mere computation and the rate to meet it should be graduated accordingly.

Very respectfully,
RICHARD EVANS,
Assistant Attorney General.

SHERIFFS; FEES:—Sheriffs may not claim fees for serving notices upon inspectors of election or upon grand or petit jurors, except petit jurors for capital case or at special term.

May 29, 1919.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol, City.

My dear Judge:

In your letter of the 23d instant, you ask:

"Is the claim of a Sheriff for serving notices to managers of a General or Primary Election provided for by law to be paid from the County Treasury as a legal claim in itself against the County Treasury? Is the claim of a Sheriff for summoning Grand and Petit Jurors (general term) a legal claim in itself against the County expressly provided for by law to be paid from the County Treasury?"

In reply I beg to advise as follows: Before any fee can be charged and paid out of a County Treasury to any officer of the State he must be able to point to the statutory provision authorizing such fee and making it a charge against the county. Code Section 3693 provides:

"The law of fees and costs must be held to be penal and no fee must be demanded or received except in cases expressly authorized by law."

Our Supreme Court in Drago's Case, 172 Ala. 157, says:

"The law of this State(however it may be in other jurisdictions) is long and well settled that counties are governmental agencies of the State, and that they are therefore chargeable with and liable for those claims or demands—and those only—which the law imposes upon them, or empowers them to contract for. No officer can charge the county with the payment of any claim due him, however meritorious or whatever benefit the county may derive therefrom, unless expressly or by necessary implication authorized by law. —Jack v. Moore, 66 Ala. 187; Posey v. Mobile, 50 Ala. 6; Barbour County v. Clark, 50 Ala. 418; Naftel v. Montgomery County, 127 Ala. 563, 567, 29 South. 29."

I find no provision authorizing a charge for fees by the Sheriff against the county for serving notices upon inspectors of elections required under Code Section 348.

As to summoning grand and petit jurors at the regular term of court, neither do I find any provision authorizing a charge for such services against the county except in the case of summoning petit jurors in capital cases. In Acts 1911, p. 41, it is provided, inter alia, "for summoning jury in capital cases or at any special court for the trial of criminals, to be paid out of the county treasury, five dollars."

I am therefore of the opinion that except as to petit jurors in a capital case, there is no express provision for charging a fee against the county, and that all services except the summoning of a capital jury are to be performed ex officio.

Yours very truly,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS; ELECTIONS:—For filling vacancy in Congress, no maximum limit is set to time allowed for calling election, but minimum of 30 days is fixed by requirement for publication.

May 30, 1919.

Hon. W. D. Nesbitt,
Capitol,
City.

Dear Sir:

In reply to your inquiry propounding the following questions:

1. In calling elections to fill the vacancy caused by the death of Congressman Burnett in the Seventh Congressional District, is there any limit to the time allowed within which the Governor shall call the elections?
2. What is the minimum time after the call is issued before the election can be held and what is the maximum time allowed after the call before the election can be held?

I beg to advise as follows:

The special election to be held to fill the vacancy in Congress caused by the death of Hon. John L. Burnett is held under and pursuant to Code Section 439 (2), (which requires a special election),

“When a vacancy occurs in the office of representative in Congress of the United States, by which the State will be deprived of its full representation at any time Congress will be in session prior to the next general election for that office.”

This election is held and conducted and in all respects regulated by the provision relating to *general* elections, Code Section 445.

No time limit is set, either a minimum or maximum, within which said election may be called.

Code Section 440, governing same, reads as follows:

“All special elections shall be held on such day as the Governor may direct.”

But under the provisions of Code Section 357, the sheriffs of the several counties are required to give at least thirty (30) days' notice by publication before each election, and consequently, this fixes a minimum limit of at least thirty days, but no maximum is fixed—that is left to the discretion of the Governor.

Very respectfully,

J. Q. SMITH,
Attorney General.

PROHIBITION LAWS:—\$50 reward under section 12 of prohibition law of 1919 is not paid until after property has been condemned and sold.

May 31, 1919.

Mr. George C. Richards,
Sheriff Perry County,
Marion, Alabama.

Dear Sir:

In reply to your favor of May 29, in reference to the fifty (\$50.00) dollars reward provided for in Section 12 of the prohibition law (Acts 1919, p. 12) I beg to advise you the substance of this provision is that any person who permits a still to exist on the premises forfeits the premises to the State of Alabama. This forfeiture of the land must be enforced by a bill filed on the equity side of the Circuit Court. When the land is sold fifty (\$50.00) dollars of the proceeds goes to the sheriff or any person who made the seizure and whose efforts resulted in a conviction.

Under this Section you will not be entitled to the fifty (\$50.00) dollars until condemnation proceedings have been instituted by the solicitor of your circuit and the land forfeited.

Under Section 10 of the prohibition law (Acts 1919, p. 11) it is provided that whenever a person is convicted in the *Circuit Court* of unlawfully distilling liquor (which is a felony under the new law and cannot be tried by the county court), then a fee of fifty (\$50.00) dollars is taxed in such cases. However, this has no application to trial in the county court.

I, therefore, advise you that you are not entitled to the fifty (\$50.00) dollars reward until the property has been

condemned and sold and out of the proceeds of the sale, the statute directs that you be paid the sum of fifty (\$50.00) dollars. I would, therefore, take it up with the county solicitor and get him to institute condemnation proceedings and forfeit the land at the earliest opportunity.

Yours very truly,

J. Q. SMITH,
Attorney General.

REAL ESTATE:—Release by mortgagee from operation of mortgage lien of portion of land covered by the mortgage does not affect the residue.

June 5, 1919.

Hon. Thos. E. Kilby,
Governor,
Capitol, City.

Dear Sir:

Replying to your communication of the 2d inst., transmitting a letter of the Hon. C. B. Rogers, relative to the release of a forty acre tract of land in Shelby County forming a part of the land covered by the mortgage of W. C. Head and wife Nettie, and O. P. Head and wife, Sarah, executed September 24, 1918, and recorded in Mortgage Record 124, pages 425-428, in the Probate Office of Shelby County, Alabama, I beg to advise as follows:

A release by a mortgagee from the operation of the mortgage lien of a portion of the land covered by the mortgage, does not affect the residue of the land covered by the mortgage.

Upon the payment of the sum of \$800.00 for the forty acre tract, to-wit, the Southwest quarter (SW $\frac{1}{4}$) of the Southwest quarter (SW $\frac{1}{4}$), of Section 9, Township 24, Range 12, East, Shelby County, Alabama, the said sum should be credited upon the note first maturing, to-wit, a note for \$3,200.00 bearing 6% interest, due December 1, 1919.

Very respectfully,

J. Q. SMITH,
Attorney General.

BOARD OF CONTROL; ACCOUNTING:—Accepted draft in payment for certain articles may be regarded as part of contract of purchase; and warrant will be drawn thereafter by the Auditor in the usual manner.

June 5, 1919.

Hon. W. D. Nesbitt,
Chairman Board of Control and Economy,
Capitol, City.

Dear Sir:

Replying to your inquiry of the 4th, beg to advise that such commodities as cotton to be used by the Convict Department should be purchased in accordance with the provisions of Sections 12, 18, and 19, of the Board of Control Act (Acts 1919, p. 43); except where such items are to be procured on emergency purchases. In such cases Section 9, of the Board of Control Act controls. In both instances, the purchases are made on contract. The form of the contract and the rules and regulations governing the contract should be such as the Board may prescribe in accordance with the provisions of the Board of Control Act and other laws which may be applicable.

I see no reason why the rules and regulations adopted for the purchase of such items as cotton may not provide for the acceptance of drafts in the matter outlined in your letter of inquiry. The accepted draft would form a part of the contract of purchase. The payment for commodities purchased would be made in the usual manner, by warrants drawn by the Auditor on the Treasurer. In this manner the draft would be eventually paid. Whether the accepted drafts would become commercial papers and what standing they would have as security, are questions that you have not asked, and which we do not go into. These, I take it, are questions of prime importance only to those from whom the purchases are made.

Yours very truly,

J. Q. SMITH,
Attorney General.

COUNTY BONDS:—Counties may issue interest-bearing warrants, within constitutional limits. Where county is indebted beyond constitutional limit, the order of the Commissioners' Court to the Probate Judge to issue warrants is void, and the Probate Judge and the County Treasurer would be liable for such payments.

June 6, 1919.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol, City.

Dear Sir:

Your recent communication to this office transmitting a letter from Probate Judge W. M. Vaughn of Dallas County propounding the following questions has been received and in reply to:

1. Without legislation specifically authorizing interest-bearing warrants, are such warrants valid as to the interest, provided the warrants are issued for lawful purposes?
2. Where a county is indebted beyond the constitutional limit, is a probate judge safe in paying the warrants even though they are issued for lawful purposes?"

I beg to advise upon said questions—answering seriatim—as follows:

Assuming, as the question does, that the warrant is "issued for lawful uprposes," it has been several times held that the counties may contract for the issue of interest-bearing warrants—provided, of course, that thereby they do not transcend the constitutional limitations imposed by Section 224 of the Constitution.

Board of Revenue, Shelby County v. Farson Son & Company, 197 Ala. 375;
Town of Eutaw v. Coleman, 189 Ala. 165 (177-8);
Littlejohn v. Littlejohn, 195 Ala. 614;
O'Rear v. Sartain, 193 Ala. 275;
Talley v. Com. Court Jackson County, 175 Ala. 644;
Matkin v. Marengo, 137 Ala. 155.

In reference to paying warrants where the county has reached its constitutional limit, it has been held in Brown

v. Gay-Padgett Hardware Co., 66 So. 161 (162), that after the county has reached the limit it may then incur only bills for current expenses for the tax year. In other words, it may anticipate the one year's revenue and contract therein—the principle being “to pay as you go.” If this were not so, a county having reached its constitutional limit, would be absolutely powerless to contract for current necessities, absolutely indispensable to its operation and continuance as a political arm of the State. But beyond this it may not go, and any debts or obligations contracted after the constitutional limitation prescribed in Section 224 of the Constitution has been reached and for said current expenses within one year's tax revenues are void. When void it is the duty of the treasurer of the County to refuse to pay them, and it would also be the duty of the Probate Judge if it is manifest and apparent on the face of it, to refuse to issue the warrant.

While it is the function of the Court of County Commissioners to audit and pass upon accounts, yet if the matter upon which they presume to act is beyond their jurisdiction, as where the constitutional inhibition is operative, then the issuance by the Probate Judge of a warrant after audit, would seem to be not merely an administrative or executive function on his part. The issuance of a warrant by the Probate Judge is administrative only when he acts within a colorable power, and if the act is void he should refuse to issue the warrant.

“If the record should show affirmatively that the court had allowed a claim not legally chargeable on the county, the allowance of which was an excess of the authority with which the court is entrusted, the allowance would be void. But when the claim is of the character with which the county is by law chargeable, the audit and allowance creates a *prima facie* liability on the county; the power of the commissioners' court is exhausted; and the *prima facie* liability of the county imposes on the judge of probate the duty of giving the claimant a warrant on the county treasury for the amount allowed. He is without authority to revise the action of the commissioners' court in the allowance of the claim, as he would be without authority to revise its action in the disallowance of a claim. The

duty of the judge, is obedience to the mandate of the court; a mere ministerial duty imposed on him in his ministerial capacity of the keeper of the records of the court, in the performance of which he is without discretion.—Commissioners' Court v. Moore, 53 Ala. 25. In Jack v. Moore, 66 Ala. 187, it was said: "The issue of warrants on the county treasury in payment of claims the commissioners' court have allowed and ordered to be paid, is a ministerial duty imposed on the judge of probate, in the performance of which he has no discretion, unless the order of allowance is itself void, and on its face an absolute nullity, imposing no duty, and conferring no rights.'"

Jeffersonian Publishing Co. v. Hilliard, 105 Ala. 578.

Where the act is affirmatively shown by the record to be void, and in excess of authority, and the amount involved in the void act is lost through the payment of the county treasurer or by drawing of an illegal warrant by the probate judge, then in such event, either one or both of said officers may be sued upon their bond by the county. See Mobile v. Williams, 180 Ala. 646; Savage v. Matthews, 98 Ala. 535.

Very respectfully,

RICHARD EVANS.

Assistant Attorney General.

SHERIFFS; FEES:—Sheriff and his deputy not entitled to the \$2.00 allowed by section 6699 of Code to substitute attending county court in lieu of such officers.

June 6, 1919.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol, City.

My dear Judge:

The Attorney General's office is in receipt of your communication of the 3d inst., asking whether the \$2.00 per day provided for in Code Section 6699 refers to the sheriff or his deputy sheriff, and in reply thereto I beg to advise:

The said Code Section 6699 reads as follows:

"The terms of the county court shall be attended by the sheriff or deputy sheriff; and, in their absence, some suitable person shall be appointed to act in their stead, whose compensation shall be two dollars a day, to be paid out of the county treasury."

In the above quoted section I am of the opinion that the word "whose" refers to the last antecedent, to-wit, "some suitable person" other than the sheriff or his deputy.

Code Section 6699 was brought forward from the Code of 1896, being Section 4596 therein, and was transported verbatim. Said Section 4596 was interpreted by our Supreme Court in *Torbert v. Hale County*, 131 Ala. 143 (145), wherein the court said:

"Two sections of the Code are relied upon as fixing the compensation claimed by the plaintiff in the first count and as imposing a liability upon the defendant. The first, to which we will now advert is section 4596 of the Code. Confessedly this Section imposes the duty upon the sheriff or deputy sheriff to attend upon the sittings of the county court; and also provides, in the event that either of them fails to attend, for the appointment by the court of some suitable person to perform the duties which they would be required to perform, if present, and for compensation to be paid to that person. Clearly, under the rule requiring a strict construction, the provision for compensation can not be extended to the sheriff or his deputy. Indeed, by no rule of construction can the language employed be held to refer to either of them.

I am therefore of the opinion that the two dollars compensation provided by said Section 6699 is intended to be paid to some suitable person appointed as a substitute and in lieu of the sheriff or his deputy for attendance upon the county court.

Very respectfully,

J. Q. SMITH,
Attorney General.

COUNTY DEPOSITORIES:—Under 1915 Act abolishing county treasurer in counties of less than 50,000 population, the president of the Board of Revenue is required to keep account of separate funds, in form prescribed by Code section 218; duty of depository is merely to receive and disburse funds, as with ordinary commercial accounts, upon warrants showing authority for their issue.

June 6, 1919.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your communication of the 3d inst, asking the interpretation of the duties and requirements imposed by an act entitled An Act to abolish the office of county treasurer, &c., approved September 15, 1915—Acts 1915, p. 348, et seq.—with reference to the keeping of accounts required by law. I beg to advise as follows:

This act abolishes in counties of less than 50,000 population, the office of county treasurer and provides for the depositing of county funds in certain banks in lieu thereof. Section 4 of said Act provides:

“Section 4. That accounts shall be opened and kept in said bank in such manner and funds as such board may direct, disbursements to be made upon the order of the board of revenue or court of county commissioners, and said bank shall furnish said board with a full and detailed statement of the receipts and disbursements, &c.”

Section 5 of said Act provides:

“Section 5. The bank or banks so designated as depositories for county funds shall be charged with all the duties and subject to the same liabilities *in so far* as the safe-keeping and paying out of the funds of the several counties are concerned, as are now imposed by law upon county treasurers.”

Section 6 of said Act provides:

“Section 6. All acts required by law to be performed by the county treasurer, *outside of the receipts*

and disbursements of the county funds shall be performed by the president of the board of revenue or court of county commissioners of the county."

It will thus be observed that the duties of safe-keeping and paying out of funds are imposed upon the bank, and any other duties than safe-keeping and paying out are, according to Section 6, *supra*, to be done and performed by the president of the Board of Revenue or Court of County Commissioners. It will be noted also from said Section 4 that it is incumbent upon the Board of Revenue to open up such accounts with depositories of the several county funds as they may deem best; e. g., fine and forfeiture funds or special taxes levied pursuant to Section 215 of the Constitution or Section 2207 of the Code, or for any other special matter.

Pursuant to the requirement under said Section 6 that the President of the Board of Revenue is required to do and perform all the duties of the county treasurer *except as to the receipting and disbursing* of county funds, it is incumbent upon such officer in pursuance of said mandate to register and keep the account of the separate funds as may have been enjoined pursuant to Code Section 211 upon the former county treasurer. And in this connection it will be noted that subsection 9 of said Section 211, requires that accounts be kept in the form prescribed by Code Section 218, so the keeping of the books or register of accounts of the several funds is a duty enjoined upon and to be performed under the terms of said act by the president of the board of revenue or court of county commissioners.

My opinion and interpretation of the act in question is, that it was the intent thereof to merely require banks to receipt and disburse funds kept thereunder, of the several accounts of various funds as might be opened up with them, giving itemized and detailed statements twice a year, as required by said Section 4, of the receipts and disbursements. In other words, the accounts were merely those of checking, commercial accounts as ordinarily carried by banks and the duty of keeping the books or register of the separate funds or accounts was a matter enjoined upon the president of the board of revenue. All warrants, however, drawn upon the depository or bank should be signed as provided by a resolution of the board of revenue or county

commissioners spread upon the minutes, designating the person mentioned in Section 5 of said Act, who should sign said warrants, i. e., whether it should be the probate judge, the president of the board of revenue or court of county commissioners.

I do not find that this Act has ever been construed; its constitutionality was passed upon in the case of *The State ex rel. Mims v. Bugg et al*, 196 Ala. 460. But the question in that case was merely one of the constitutionality of the Act with reference to the comprehensiveness of the title.

Very respectfully,

RICHARD EVANS,
Assistant Attorney General.

COUNTY DEPOSITORY; COUNTY WARRANTS.—Where money was loaned county by depository on warrants not interest-bearing, no interest can be paid unless written records of Commissioners Court show agreement to pay interest in consideration of loan.

June 9, 1919.

Hon. Jos. H. James,
Deputy Solicitor,
Greensboro, Alabama.

Dear Sir:

In reply to your letter of June 6, I beg to state that you were advised by this office on April 30, that the mere fact that a bank had been designated as Depository of County funds would not prevent it from making a lawful loan of money to the county and collecting interest thereon when the transaction was had and done in a way and manner provided by law for the borrowing of money by the county.

In response to this opinion you now inform us that a bank in your county which was the depository for county funds had in hand two State warrants for use in road work, that the State was unable to cash the warrant at that time, and that the bank advanced the county by way of a loan an amount equal to the face of the warrants which loan was continued for some months, and that the bank now claims interest from the county. You further state that there was no action by the court of county commissioners authorizing the bank to loan this money to the county, and no

authority was given to the bank by the Probate Judge to do this; that the county used the money so furnished, and that the bank now presents its claim for interest on said sum at the rate of six per cent. And you ask us for an opinion as to whether or not the Commissioners Court can now ratify this act of the bank should they see fit to do so, and allow this claim against the county for interest.

I am of the opinion that the court of county commissioners has no authority to allow the claim for interest in favor of the bank unless the county was originally bound by law for the payment of such interest. In other words, an agreement on the part of the court of county commissioners to pay interest in a case where the county was not originally liable for that interest, would be without consideration, and would therefore be a mere *nudum pactum*. Moreover, the Court of Appeals has recently held that, the court of county commissioners being a court of record, a written memorial is the only evidence that other courts can receive of its proceedings, whether it is of the exercise of judicial or merely ministerial authority and duty. Under this decision all proceedings with reference to this transaction should be of record, and there being nothing of record to show that the county was originally liable for the payment of interest, it is of my opinion that the court of county commissioners would not be authorized to pay any interest on the sum borrowed.

Very truly yours,

J. Q. SMITH,
Attorney General.

LICENSES:—Under license act of 1915, bottler's license cannot be taken out for less period than a year.

June 9, 1919.

State Board of Equalization,
Capitol.

Dear Sirs:

In reply to your recent inquiry whether paragraphs A, B, C, D, and E, Subdivision 18, of Section 1, License Act, 1915, permit the taking out of license by bottlers for a half year period, I beg to advise that such is not the case.

The provision contained in such paragraph "operated at any time during license year" controls over any other statement in the act which permits the taking out of license for less period than one year. Where the statement is made that the license shall be paid on each machine operated at any time during a license year, the full yearly license must be paid, irrespective of the length of time during which the machine is actually operated.

Yours very truly,

J. Q. SMITH,
Attorney General.

ACCOUNTING; REAL ESTATE:—Ten per cent commission to representative of State Auditor for investigating tax sales, fixed by section 264 of 1915 revenue act, is calculated on total amount of sale, before deducting fees of other officers.

June 9, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol, City.

Dear Sir:

I have your inquiry of June 3, relative to the compensation that a representative of the State Auditor is entitled to for investigating sales of real estate for taxes, as provided by Section 263, of the Revenue Bill of 1915, and in reply thereto beg to advise you:

Section 264 of the bill limits the compensation to not exceed 10% of the proceeds of such land sale or redemption and it provides that this compensation *shall be paid from the fund so received.*

I interpret this to mean that the Legislature intended that the State could pay a commission not to exceed 10% on the total amount received from sales, and therefore the agent could receive a fee of 10% on the amount allowed the various officers for selling the property for taxes, provided the contract so provided.

Yours very truly,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS:—Act of Sept. 15, 1915, in regard to salary of certain judges and solicitors, conforms to sections 45, 218, and 281 of the Constitution.

June 9, 1919.

Hon. Temple Seibels,
Solicitor,
Montgomery, Ala.

Dear Sir:

I have before me a letter of date April 22, 1919, addressed by Hon. Geo. F. Smoot, County Treasurer of Elmore County to Mr. Moore, County Solicitor of that county, in which certain questions are asked with reference to the validity of the Act approved September 15, 1915, in regard to the salary of certain circuit judges and solicitors. I am returning said letter herewith and in this letter I will endeavor to answer the questions raised by Mr. Smoot.

1. He desires to know if the Act violates Section 45 of the Constitution. That inquiry I will answer in the negative for the following reasons:

The mischief designed to be remedied by that provision of the Constitution was, as has been said, for the prevention of fraud or surprise or deception upon the Legislature by means of provisions in a bill of which the title gives no intimation; and the law also intended by such provisions, to provide by the caption of an act that the public be fairly apprised of the purpose of the act. *Ex Parte Thomas*, 113 Ala. 1. But, as has also been said:

“It was never intended by the Constitution that every law which would affect some previous statute of variant provisions on the same subject, should set out the statute or statutes so affected at full length. If this were so, it would be impossible to legislate.”

Ferguson v. Commissioners Court, 187 Ala. 645, 652, and cases there cited.

The full effect of the amendatory Act in question can be determined without reference to the Act which it seeks to amend. The caption seems sufficient to advise any one who reads it of its contents and for these reasons it seems that there is no good ground for the highly technical objections that may be raised, depending on the violation of this Section of the Constitution to sustain them.

2. It is desired to know further whether the Act is violative of Section 218 of the Constitution. This is a constitutional provision that I can find nowhere to have been construed by the Courts. However, I take it, that like Section 225 of the Constitution, it refers to charges in existence at the date of ratification of the Constitution. See *Gunter v. Hackworth*, 182 Ala. 205. Provision for distributing the payment of salary of circuit judges and solicitors between the state and county have long existed in this State, and this Act has, generally speaking, to support its validity the unquestioned construction of validity which has throughout the years been placed upon similar provisions for the payment of the salaries of such officers. For authority on the general proposition of the right of the Legislature to so distribute the payment of such salaries, we refer to a similar case considered by the Supreme Court of Missouri in the case of *Hamilton & Treat v. St. Louis Co. Court*, 15 Mo. p. 1.

3. The last question asked is, "May the present incumbents of the judicial offices of such circuit avail themselves of the benefits of the act in question, in view of Section 281 of the Constitution?" This Section was intended to prohibit the increase or diminution of the salary, fees or compensation of any officer during the term for which he shall have been elected or appointed. Inasmuch as the act in question was approved prior to the beginning of the term to which the judges and solicitor were elected or appointed, I cannot see how this Section in any way weakens the validity of the act in question.

Very truly yours,

J. Q. SMITH,
Attorney General.

DEPARTMENTAL EXPENSE; PRINTING:—Fertilizer tags should be purchased through Board of Control and Economy.

Hon. H. F. Lee,
State Auditor,
Capitol.

June 9, 1919.

Dear Sir:

Replying to your inquiry of June 4, with reference to purchase of fertilizer tags, I beg to advise in my opinion

the Board of Control and Economy Act (Acts 1919, p. 43), requires that these tags be purchased through the Board of Control and Economy.

The duties imposed upon you under Section 28 of the Code remain undisturbed, except that you should have the Board of Control and Economy to purchase the tags.

Yours very truly,

J. Q. SMITH,
Attorney General.

CHILD WELFARE; COUNTY EXPENSE:—Probate Court may make provision for maintenance of children whose parents are unable or unfit to care for them and for whom no master can be found; and such maintenance is proper charge against county, upon proper orders and records made.

June 11, 1919.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol, City.

Dear Sir:

Your recent communication to the Attorney General has been referred to me for opinion and reply.

You ask:

“If the Probate Judge of Dallas County, Alabama, draws a warrant upon the General funds of County, for the maintenance and support of children, whose father had deserted them, their mother morally unfit to care for them, neither father or mother having any funds with which to support the children, and the children having no estate, the children not being committed to any home or Reformatory, and no Master being found for the Children, but a Church with a home for children taking the children—provided the payment of the fund for which warrant is drawn is made should the said sum so paid be charged back to the Probate Judge, or is the same a legal charge under the Juvenile Act (Acts 1915)?”

Code Section 6450 as amended by an act approved Sept. 16, 1915 (Acts 1915, p. 577 et seq.) reads in part as follows:

"Juvenile Wards of the State Defined. * * * And generally any child who so deports himself or is in such conditions, or surrounding, or is under such improper, or insufficient guardianship, or control, as to endanger the morals, health, or general welfare of such child, shall be deemed a ward of the State, and entitled to its care and protection; and the State shall exercise its right of guardianship and control over such child in the manner hereinafter provided."

Code Section 6451 as amended by said act (Acts 1915, p. 578) in part reads:

"The probate courts of the several counties of the State shall have original jurisdiction of all proceedings coming under the provisions of this chapter, and in cities having recorder's courts, with the power to try misdemeanants against the laws of Alabama, in such cities such recorder's courts shall have concurrent jurisdiction with said probate courts, etc. * * * All such expenses, and all expenses of maintenance and care of wards of the courts under detention that may be incurred by order of said courts in carrying out the provisions and intent of this chapter shall be a valid charge against said city or county, as the case may be."

Code Section 6453 as amended by said act (Acts 1915, p. 580) reads in part as follows:

"Juvenile Courts; Practice and Rules of. Such probate courts, and such recorder's courts, as have jurisdiction conferred upon them by this chapter, shall keep a separate docket for the trial of such cases, and shall enter its orders and decrees, etc. * * * And the court, if satisfied that the child is in need of the care, discipline, or protection of the State, may so adjudicate, and may further render such judgment and make such order or commitment according to circumstances of the case as will conserve the welfare of said child and purposes of this chapter. It is the intention of this chapter that in all proceedings coming under its provisions, the court shall proceed upon the theory that said child is a ward of the State and is subject to the discipline, and entitled to the protection, which the

court should give such child under the conditions disclosed in the case."

Code Section 6456 as amended by said Act (Acts 1915, p. 582) reads in part as follows:

"If the child have a home, it must be preferred unless the character, or condition of the parents, guardian, or person having control of the home of the child, is such as to forbid the keeping of the child in such home; and in this case the court may commit the child to the custody of some suitable person, or home, and if the parents of the child have the means, they may be required to provide for the support of the child under the orders of the court. * * * If the child have neither parents, who are liable to provide for it, nor estate sufficient for its maintenance, then the child may be committed to any home, or school or reformatory in this State that will receive and maintain the child. * * * And if no master can be found for the child the court of the county commissioners, or board of revenue, of the county, of the residence of the child, shall be required by the said probate court to pay for its reasonable and proper support, till a home or master can be found for the child, or till it is adjudged by the court to be able to make its own living. Any final order or judgment made by the court in the case of any such child shall be subject to any modification, from time to time, as the court may consider to be for the welfare of such child; the duty being constant upon the court to give to all children subject to its jurisdiction such oversight and control in the premises as will conduce to the welfare of said children, and to the best interest of the State. * * * The expenses of transporting said children to said institution, home or to any other custodial agency, shall be borne by said county, or city, as the case may be. Jurisdiction having once been obtained of any child shall continue during the minority of such child."

Assuming that the father of said children has deserted them, and that their mother is morally unfit to care for them, that they have no estate, and that the surroundings

and moral atmosphere are injurious to the welfare of the children; that no Master has been found for them, and the other elements predicated in your question are true, I am of the opinion that under and by virtue of the terms of said act, it is within the province of the probate court sitting as the juvenile court, to make provisions for the maintenance and keep of said children, and to place them in the home or institution to which they have been sent, and that such maintenance or keep is a charge upon the county.

It should be observed, however, that the foregoing provisions with reference to making children wards of the State under the juvenile court act are purely statutory and that the authority of such a court is purely statutory and being a court of statutory or limited jurisdiction, its acts and doings should be made to appear affirmatively of record. Assuming that the record affirmatively shows the jurisdictional facts, and orders have accordingly been made of record in the minutes of the court, I am of the opinion as said above that the charge is proper if the minutes show jurisdictional facts.

Very respectfully,
RICHARD EVANS,
Assistant Attorney General.

BANKS:—A company receiving deposits from its employees, subject to interest and subject to withdrawal in specified amounts on notice, is engaged in a banking business.

June 11, 1919.

Hon. D. F. Green,
Supt. of Banks,
Capitol.

Dear Sir:

Replying to your request for an opinion whether or not the Tennessee Coal, Iron and R. R. Company is violating the banking laws of the State by receiving deposits of money from its employees, subject to interest, and subject to withdrawal in specified amounts on notice.

I am returning herewith the pass book and correspondence which you submitted along with the inquiry.

The banking laws are intended to regulate the business of banking, but there is no definition of "banking business"

contained in the banking act, other than that the word "bank" as used in the act means any person, firm, partnership or corporation doing or carrying on a banking business.

The main purpose of regulating the banking business as the business is now carried on, is to insure the safety of deposits. The calamities that befall individuals or communities as the result of bank failures are well known. As has been said, most bankers would be honest if there were no laws regulating the banking business and the great majority of them would carry on that business on safe and conservative lines. For such, there is no necessity for regulations. It is for the dishonest, the careless, and the incompetent banker that regulative laws become essential and inasmuch as it is necessary at all to resort to regulation, it must apply to all engaged in the transaction of the same kind of business under substantially similar conditions.

The most obvious purpose of banking institutions, as said in the case of *Oulton v. German Saving, etc. Society*, 17 Wall. 190, is the receiving deposits of money. Other functions are those of making discounts and issuing circulating notes. It seems that the *Tennessee Coal, Iron & R. R. Co.* is engaged without question, in the most obvious purpose of banking institutions; that is, in receiving deposits of money, and presumably, in view of the purpose of the statute, the character of banking that it is carrying on requires that it be carried on in conformity with the banking laws of this State. See the case of *McLauren v. State*, 141 Wis. 577, and note to that case as reported in the 18th *Amr. & Eng. Annotated Cases*, page 826. It will be seen from the cases considered in the note above referred to that it is not necessary for a person or corporation to be exercising all the functions of a banking institution in order to be doing a banking business, but that it will be held to be so engaged even though but one of the functions are exercised.

The position taken by the *Tenn. Coal, Iron & R. R. Co.* doubtlessly will be that in view of the fact that the receiving of deposits by them is only incidental to their main business of mining coal and iron and that their banking business is limited to receiving funds in a limited amount from their employees only, they are justified in receiving

deposits as they do, without being subject to the charge of doing a banking business that should be subject to the control of the State Banking Department. While a coal and iron mining corporation, perhaps could not be held to be engaged in the banking business by accepting a single deposit from an employee and while, of necessity, there must be some border ground where it would be difficult to say whether the character of banking business which it was engaged in was sufficient to make it amenable to the banking laws, I am of the opinion that where such a corporation as the Tennessee Coal, Iron & R. R. Company, as a regular business, solicits, receives, or accepts money from its employees on deposit, it would be engaging in the banking business to such an extent as to make it amenable to the banking laws. This holding is in line with that of the Supreme Court of Wisconsin in the McLauren case, where it was held that a corporation engaged in the general business of operating a department store which received money up to \$500.00 from any one desiring to deposit with it, issued pass books evidencing such deposits, paid interest on the amount of deposits and paid the principal sum deposited with interest—was engaged in the banking business within the terms of the Wisconsin Statute which declared the soliciting, receiving, or accepting of money on deposit as a regular business by any person or corporation, to be a banking business whether such deposit is made subject to checking, or is evidenced by certificate of deposit, a banking note, a receipt, or other writing. The principal distinction between the Wisconsin case and the case we are here considering is that our statute does not define what is a banking business and under the facts of our case deposits are limited to employees of the company; whereas, in the Wisconsin case they are accepted from the public generally.

I do not think there is any distinction between the two cases growing out of the absence of a definition of the term "banking" in the Alabama statute, because clearly the term "banking business" as generally used is as broad as the Wisconsin statute defines it to be; and I do not think the fact that, in the Wisconsin case, the invitation to do business was extended to the public, while in the case we are considering, it is limited to employees of the corporation, is sufficient to take the Tennessee Coal, Iron & R. R. Com-

pany out of the influence of the decision under which the Wisconsin Court held the Wisconsin corporation engaged in the banking business, when we consider that the purpose of the banking law is to insure the safety of deposits and when we consider the fact that employees of large corporations engaged in the mining business, such as the Tennessee Coal, Iron & R. R. Company is engaged in, are more than likely to be very numerous and as little capable of determining who is a safe and proper person with whom to deposit their earnings, as any element of the community.

Yours very truly.

J. Q. SMITH,
Attorney General.

BOARD OF CONTROL AND ECONOMY:—Chief clerks may sign requisitions for supplies if given authority by their department heads.

June 11, 1919.

Hon. W. D. Nesbitt,
Chairman State Board of Control & Economy,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your communication of the 11th, asking to be advised whether or not under Section 17 of Senate Bill 101 (Acts 1919, p. 46) the chief clerk of the State department may sign requisitions for supplies, and in reply I beg to say:

I am of the opinion that the chief clerks are authorized to sign requisitions where the authority is given to them by the head of the department. I would suggest that when such a requisition comes in that you inquire as to whether or not they have authority from the head of their department to sign said requisition.

Yours very truly.

J. Q. SMITH,
Attorney General.

DEPARTMENTAL EXPENSE; HIGHWAY DEPARTMENT:—

Freight on automobiles given to Highway Department may be paid out of annual appropriation from convict fund.

June 11, 1919.

Hon. W. S. Keller,
State Highway Engineer,
Capitol, City.

Dear Sir:

In reply to your communication of this date, asking whether your department has authority under the Act approved February 5, 1911, entitled "An Act to provide for the creation of a State Highway Commission," etc., (Acts 1911, p. 223), to pay the freight on a number of automobiles which the "United States Government has given to the State Highway Department," I beg to advise as follows:

Under the authority of Section 5 of said Act it is provided that necessary incidental expenses for the conduct of the business of the State Highway Commission shall be paid out of the annual appropriation from the convict fund. If these automobiles are necessary as means and instrumentalities in the construction and maintenance of public roads, and in furtherance of the purposes of the Act, I think it would be one of the incidental or implied expenses authorized by said Section 5 of the Act above mentioned.

Very truly yours,

J. Q. SMITH,
Attorney General.

CONVICTS; TRANSFER OF PRISONERS:—Section 6642 of Code is not applicable in bringing prisoners from other states into this State, under section 6645.

June 12, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

In reply to your inquiry of June 11, I beg to advise that Section 6645 of the Code, which is a codification of an Act approved February 10, 1891, provides for the expense of the removal of a prisoner charged with a felony from an-

other State into this State. Section 6642 of the Code is a part of the codification of an Act approved December 12, 1892. This section provides for guards authorized under orders of the Court, but applies only to the removal of prisoners from one county to another county within this State. The two sections mentioned being the outgrowth of the codification of different Acts of the Legislature, I am of the opinion that Section 6642 providing for guards, is not applicable where it is desired to bring a prisoner from another State into this State under authority of Section 6645, and that in the latter event no provision is made for the payment of guards.

Very truly yours,
J. Q. SMITH,
Attorney General.

SCHOOL SYSTEM:—An election to levy tax to provide for payment of interest and sinking fund on bonds previously issued may be held under 1915 Act but not under 1919 Act.

June 14, 1919.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

In reply to your inquiry of May 30, asking whether the funds arising from a school tax levy in the town of Auburn may be applied legally to the payment of interest on bonds issued by the municipality for school purposes some twenty years ago, and for the creation of a sinking fund for the retirement of said bonds, I beg to advise that I am of the opinion that under the educational amendment to the Constitution, such a disposition of the funds arising from a special school tax levy would be permissible, inasmuch as such a use of the funds would be "for public school purposes."

However the Act approved February 13, 1919, passed in part for the purpose of putting said constitutional amendment into effect, provides in Section 6 that in order to erect, repair or equip a school building, or to make improvements in school facilities of any school district which may be

levying a special district tax for school purposes, the Board of Education is authorized to issue interest bearing warrants. I do not see how, under the authority of this Act, the authority herein given to issue warrants to erect, repair or equip a school building, or to make improvements in school facilities, could be extended to provide for the payment of a debt created to secure improvements which have already been provided; but I am of the opinion that the Act approved September 10, 1915 (Acts 1915, p. 360), authorizing special school elections, is sufficiently broad for the holding of an election to secure funds for the purposes in question. That Act provides in Section 5 that "the special tax for school purposes in any school district shall be used for the exclusive benefit of the public schools of such district" and consequently is broad enough to include the purpose here under consideration.

I am, therefore, of the opinion that such an election as that desired should be held under the Act of 1915, and not under the Act of 1919, and if the tax is voted under this Act, that the fund derived from such tax may be used for the purpose of paying interest on the bonds in question and to provide a sinking fund for their payment.

Yours truly,
L. E. BROWN,
Assistant Attorney General.

COMPENSATION:—The State is not liable for injuries received by its employees.

June 19, 1919.

Hon. C. B. Rogers,
President Board of Convict Inspectors,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of June 18, enclosing letter from Mr. W. E. Belew, of Littleton, Ala., in which you ask to be advised as to whether or not the State is liable where a person is employed by the State, and is injured while in such employment. In answer thereto I beg to state that Section 14 of the Constitution of 1901, provides that:

"Section 14. The State of Alabama shall never be made a defendant in any court of law or equity."

It was held in the case of *State v. Hill* 54 Ala. p. 67 that the State is not liable for the torts of its agents or officers.

I am, therefore, of the opinion and so advise you that the State is not liable for the injuries of Mr. Belew while in the employment of the State.

Very truly yours,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS; SHERIFFS; PROHIBITION LAWS:—Public officers are required to perform all services without charge where the statute does not carry express provision for fee.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol, City.

Dear Sir:

The Attorney General's office is in receipt of your communication of the 11th inst., with attached letter of Mr. N. H. Jones, Examiner of Public Accounts, requesting advice upon the following question:

"In a conviction of violation of the prohibition law, other than the one passed for Bibb County, 1886, is the sheriff entitled to retain one-half of the fine as an informer's fee?"

In reply, I beg to advise as follows:

Before public officers are justified in charging fees they must be able to point out specifically to an authorization pursuant to statute giving such fees. If there be no statute authorizing such fee, then the officer cannot make charge for nor demand such, as the service is then presumed to be a part of his *ex officio* duties; in other words, all public officers take their office *cum onere* and are required to perform all services as gratuities where the statute does not carry express provision for a fee.

The Act referred to in the question propounded (Acts 86-87, p. 705) giving one-half of the fine assessed for infraction of the prohibition law of Bibb County is given to informers who may be any person and does not expressly grant such sum to sheriffs or any other public officers, and it is my opinion that under that Act it would be the duty of the Sheriff to make arrests, if he had the proper information, as a part of his ex officio duties.

Subsequent prohibition statutes do not, so far as I am aware, carry any sums or amounts to be paid to informers of infractions of the prohibition law, except in the case of the present prohibition Act approved January 25, 1919, being Sections 10, 12 and 13 thereof (Acts 1919, p. 11), and in that Act the sheriff is specifically authorized to receive and participate in the rewards.

I am, therefore, of the opinion that the charging up of one-half of all the fines previously collected by the sheriff of Bibb County upon execution in previous years, is illegal and unauthorized.

Very respectfully,

J. Q. SMITH,
Attorney General.

SHERIFFS; MUNICIPAL COURT:—Guard fees not authorized where no conviction follows in cases originating in the municipal court.

June 20, 1919.

Hon. Jos. R. Tate,
Solicitor 10th Judicial Circuit,
Birmingham, Alabama.

Dear Sir:

The Attorney General's office is in receipt of your recent communication, in which you ask:

"Is the county entitled to guard fees in cases where the prosecution is commenced in the inferior courts of this county and not proessed or settled in said courts by agreement?"

In reply I beg to advise:

Acts 1911, p. 41 amending Code Section 6638 provides inter alia, as follows:

"For guarding each prisoner lawfully committed to jail in the following cases: (1) In all felony cases whether convicted or not, \$2.00. (2) In all arrests under indictment, whether convicted or not, \$2.00. (3) In all other cases where convictions follow arrests \$2.00."

The Supreme Court in the case of *Stone, Treasurer v. State ex rel Holcombe*, 197 Ala. 293 (296) in passing upon and interpreting Code Section 6638 as amended by said Act of 1911, p. 41, with reference to the inferior court of Mobile County says:

"But in this case there is no question about there being a statute allowing to sheriffs in general the compensation in controversy. (i. e. sheriff's guard fees where conviction follows in cases originating in the inferior court of Mobile County). The only question is whether in the statute governing the inferior criminal court sufficient reason is found for making an exception against the sheriff in respect of cases originating in that court, and this is to be determined at the end of a fair and reasonable effort to ascertain the legislative intent. Section 6638 as lately amended (Acts 1911, p. 41) is general in terms. It makes no exceptions and its general provision is to be made effective unless the prior local statute contains a provision to the contrary."

The conclusion of the Supreme Court in this case was that sheriffs were entitled to \$2.00 guard fees in cases originating in the inferior court of Mobile County where conviction was had. An examination of the Mobile Act and the Acts creating the municipal court of Birmingham and its predecessor, the court of common pleas of Birmingham (Local Acts of 1915, p. 231, Section 8, and Local Acts of 1911, p. 374, Section 7, respectively) will show that the Birmingham Acts are not unlike the Mobile Act, differing in the instance, rather than in the principle, and the conclusion reached in the Mobile case would likewise obtain with reference to Birmingham.

While this is true in cases where convictions are had, where no conviction is had, the statute would not seem to cover such cases.

The rule is well settled that statutes allowing fees are strictly construed as penal (See Code Section 6631), and that when the right of any officer is challenged to charge any certain fee, he must be able to point to statutory authority therefor, or the right to charge such fee does not exist.

Mobile County v. Williams, 188 Ala. 639;

North Alabama R. R. v. Lowery, 3 Ala. App. 511.

The clause numbered 3 above quoted (Acts of 1911, p. 41) provides only for a guard fee where conviction follows, and makes no provision where conviction does not follow; this being true, there is no statutory authorization for such charge without conviction in cases originating in the municipal court.

I am, therefore, of opinion that the charge for guard fees where no conviction follows in cases originating in the municipal court is without authorization.

Very respectfully,

J. Q. SMITH,
Attorney General.

SECRETARY OF STATE; MUNICIPAL CORPORATIONS—Documents filed with the Secretary of State cannot be extracted or destroyed.

June 21, 1919.

Hon. Wm. P. Cobb,
Secretary of State,
Capitol, City.

Dear Sir:

This office is in receipt of your letter of the 18th inst., transmitting certain letters and documents of the town of Helena, wherein it appears that said town has filed several documents under Code Section 1059 and other Sections, with reference to "dormant municipalities," and the town of Helena now requests you to withdraw from your files a document first filed by them on, to-wit, December 30, 1916.

In reply, I would advise that you merely write the authorities of the town of Helena and say that you have re-

ceived their last document desired to be filed and that you are accordingly filing the same; but, as to withdrawing documents hitherto filed in your office, you cannot permit such as the records of your office are inviolable and cannot be extracted or destroyed.

Yours very truly.

J. Q. SMITH,
Attorney General.

CONVICT HIRE:—"Prepared coal" means "lump and all washed grades of coal." Average price of coal means average price of coal sold.

Hon. C. B. Rogers,
President Convict Board,
Capitol.

June 23, 1919.

Dear Sir:

I have looked over the correspondence and contract of the Montevallo Mining Company which you left here today, and am returning the correspondence herewith.

I think the position taken by you in your letter of June 11, addressed to the Company is correct. In accordance with the letter of Mr. Lovell, President of the Company, addressed to you dated June 16, I think that "prepared coal" as used in the contract means "lump and all washed grades of coal," and I also think that the average price of coal is to be determined by the price of that sold.

Very truly yours,

J. Q. SMITH,
Attorney General.

TAXATION:—Mortgage tax is based on actual indebtedness existing when instrument is offered for record; when additional indebtedness is created under same instrument additional tax accrues. Tax is not based on the amount of property within the State covered by the instrument.

State Board of Equalization,
Capitol.

June 26, 1919.

Dear Sir:

In reply to your inquiry of June 17, I beg to advise:

(1) The basis upon which the mortgage tax is calculated

is 15 cents on each \$100.00 of the indebtedness which is secured by the mortgage. And in any given case the indebtedness which controls is the original indebtedness, or the indebtedness which existed at the time the instrument is offered for record, although the mortgage contemplated a supplemental or further indebtedness. The creation of a supplemental or additional indebtedness has the effect of a supplemental or additional mortgage so far as the liability to the tax is concerned, so that when additional indebtedness is created, secured by the mortgage, liability for additional tax accrues. To hold that when a mortgage is given to secure bonds issued and to be issued that the tax to be collected at the time the mortgage is recorded is to be upon the amount of bonds issued and to be issued, would cause the tax to be collected upon a greater amount than the statute contemplated. The basis of the tax is the indebtedness secured by the mortgage. Indebtedness is what one owes, or in a purely technical sense, *that for which an action of debt will lie*; a sum of money due by certain and express agreement. Until the additional bonds are issued no obligation is created, there is no indebtedness except for the original amount, consequently tax can only be collected on the indebtedness as it is created.

(2) In regard to the manner in which the amount of the indebtedness should be ascertained, I am of the opinion that that part of the provisions for the mortgage tax contained in the 1915 license act which appears under subdivision g on page 513 of the Acts of 1915, which places certain duties upon the State Board of Equalization applies as far as applicable in determining the amount of indebtedness upon which the mortgage tax shall be paid where all the property is located within this State the same as it does where the property is partly within and partly without the State, so that in a case such as you mention in your inquiry it would be the duty of the State Board of Equalization to determine the amount of the indebtedness upon which the tax shall be paid. In taking this view I am applying the rule that a qualifying clause following several clauses may be applied to all of them so far as applicable or to the last only, as best accords with the purpose and spirit of the act, and the additional rule that in construing a section of an act regard must first be had to the language of the clause itself, and second to other clauses in the same act and that

construction should be adopted which makes the whole act stand consistently together or reduces the inconsistency to the smallest possible limit.

No construction should be sought or could be maintained as reasonable which would require on a given indebtedness a greater tax where all the property named as security for the indebtedness was within the State than where only a part of the property was within the State, because the clear intent is to base the tax on the size of the indebtedness, and not upon the amount of property made security for the indebtedness.

Very respectfully,
L. E. BROWN,
Assistant Attorney General.

TAXATION; BOARD OF REVENUE:—Board of Revenue of Jefferson County may not make correction in assessment involving question of value; if it should attempt to do so, it becomes duty of County Board of Equalization to report the matter to the State Board of Equalization for proper action in the premises.

June 26, 1919.

Hon. Thos. W. Sims,
Chairman, State Board of Equalization,
Capitol.

Dear Sir:

Replying to your inquiry of June 25, in regard to the position taken by the Board of Revenue of Jefferson County, as stated in the letter of Tax Collector Hawkins to you of date June 25, 1919, to the effect that they have no jurisdiction when it comes to passing on the question of whether values have been properly fixed; that even on recommendation from the Board of Equalization, they cannot allow the Tax Collector a credit as an error where he makes a deduction (on recommendation of the Board of Equalization) and seeks to take credit for the difference in the error; that they may make a change in an assessment to correct a clerical error, but cannot make a change in the assessment where the question of value comes up, even if the facts show that the tax payer really has an equitable claim; that they are not vested with the power of passing on values.

If the Board of Revenue should undertake to make such an allowance it would be the duty of the County Board of Equalization to call it to the attention of the State Board of Equalization, whose duty it would be to call it to the attention of the Attorney General to the end that proper action could be taken in the premises.

Yours very truly.

J. Q. SMITH,
Attorney General.

ROADS; COMMISSIONERS COURT; COUNTY EXPENSES:—Commissioners' Court of Escambia County may employ clerical help in connection with maintenance of roads and bridges under General Act 1919, page 573, and Local Act of Feb. 7, 1919.

July 3, 1919.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol, City.

Dear Sir:

The Attorney General's office is in receipt of your communication of the 1st inst., asking whether the court of county commissioners of Escambia County has authority to employ necessary clerical aid in connection with the maintenance and construction of public roads and bridges, pursuant to the power contained in an act, "To provide for the establishment, discontinuance, construction, use, working and maintenance of the public roads, bridges and ferries," etc. (Acts 1915, p. 573, et seq.) and an act, approved February 7, 1919, entitled an act "To confer additional duties and powers upon the court of county commissioners of Escambia County," etc. (Local Acts 1919, p. 5), and in reply I beg to advise as follows:

The general act (Acts 1915 p. 573), Section 1, provides inter alia:

"That the courts of county commissioners, boards of revenue and other like governing bodies of the several counties of this State, are invested with a general superintendence of the public roads, bridges and ferries within their respective counties, and may establish new, and change and discontinue old roads, bridges and

ferries. To this end they are given legislative, judicial and executive powers.

"They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties."

By the provisions of the act approved February 7, 1919, supra, it is provided, inter alia, as follows:

"That said court of county commissioners is authorized and it shall be their duty to make all such necessary orders and contracts and do such necessary acts and things and pass and enact such necessary rules and regulations under the Constitution as may be necessary or deemed necessary by the court to provide or aid in providing modern and satisfactory public highways and to place all roads heretofore constructed in first class condition and maintain them so continuously hereafter; it shall be the duty of the court to put all of the county roads in good condition at the same time, or as near thereto as possible, and one road shall not be improved and worked at the expense of other roads; that said court shall create different county funds for the maintenance and construction of good public highways."

A review of the provisions of the aforesaid acts indicates that the provisions thereof are broad and comprehensive enough to enable the court of county commissioners to make such contracts as in their judgment may be deemed necessary or proper in furtherance of and carrying out the provisions of said acts. And I am, therefore, of the opinion that they have the authority to employ such clerical help as may be needful or necessary to carry out the provisions thereof.

Yours very truly.

RICHARD EVANS,
Assistant Attorney General.

TICK ERADICATION—Where dipping vat within four-mile radius has been destroyed, owner must drive his cattle to the nearest or most convenient vat.

July 3, 1919.

Dr. C. A. Cary,
State Veterinarian,
Auburn, Alabama.

Dear Sir:

Your letter to the Attorney General has been received asking to be advised: If in the event a vat is blown up and there is none within four miles of the person required to dip his cattle, whether he commits a misdemeanor for failure to drive his cattle to the nearest vat indicated by the Inspector where his cattle are to be dipped.

Sections 3 and 5 of an Act approved February 7, 1919, entitled "An Act to establish and provide for State-wide eradication of the cattle tick fever," &c., (Acts 1919, p. 29), are respectively as follows:

Sec. 3. "That the required number of dipping vats in a county shall be determined by the State Veterinarian and the State and Federal Inspectors in charge of tick eradication in the county. The required number of dipping vats shall be based on the extent of area infested or exposed to tick infestation in a county. As a rule vats shall be four miles apart unless unforeseen emergencies require them to be otherwise. Provided that any person who already has a dipping vat be allowed to use the same for dipping his own or his neighbor's cattle under the supervision of the regular authorities."

Sec. 5. "That every person, firm, company or corporation having in possession or in charge as owner, agent or otherwise one or more cattle in a tick infested or quarantined premise, range, farm or pasture, that has not been released from State and Federal quarantine, shall dip the cattle regularly once every two weeks on the day and at the vat specified by the inspector in charge of the vat most convenient or nearest to the cattle. One printed or written dipping notice, given by the inspector to the person or persons in charge of or in possession of the cattle, shall be legally sufficient to require the owner, agent, firm or

person in charge to dip the cattle regularly every two weeks until released from quarantine."

In Curlee's case (75 So. 268) the Court of Appeals had before it the question whether it was a misdemeanor to disobey rules and regulations promulgated by the State Live Stock Sanitary Board with reference to dipping of cattle to eradicate ticks. The Court per Brown, P. J., said (inter alia):

"That the Legislature may confer authority on governmental agencies to make rules and regulations, the violation of which will support a prosecution, when the statute denounces the act as a crime, is settled beyond question.—Andrew Floyd v. State, 74 So. 752; Whaley v. State, 168, Ala. 152. (30 LRA (NS) 499) 6 RCL, Sec. 177, 178."

Section 5, *supra*, requires cattle in territory mentioned to be dipped each fortnight on the day and at the vat *specified by the Inspector in charge of the vat most convenient or nearest to the cattle*.

Section 3, *supra*, providing for the number of vats to be established in each county—to be determined by the State Veterinarian and the State and Federal Inspectors—it is true, directs that they be, "as a rule," four miles apart, barring "unforeseen emergencies." But the instruction with reference to their being four miles apart is, I think, plainly intended to be only directory and cannot be said to be mandatory. Especially does this appear so in view of the employment of the words "as a rule" and "unforeseen emergencies."

I am, therefore, of the opinion that it is the intent of this act that persons required to dip cattle under its provisions must drive them to "the vat most convenient or nearest" and the failure so to do lays him liable to prosecution, when the proper facts are made to appear.

Very respectfully,

RICHARD EVANS,
Assistant Attorney General.

COUNTY DEBT; TAXATION:—Debts consisting of running expenses of county for previous years, which should have been paid out of current revenue, may be retired from surplus current funds, if such debts were valid at the time contracted.

Hon. Chas. E. McCall, July 8, 1919.
Chief Examiner of Public Accounts,
Capitol, City.

Dear Sir:

The letter of Probate Judge W. M. Vaughan transmitted by you to this office with request for advice thereon, has been referred to me for opinion and reply.

I beg to advise as follows:

Sec. 224 of the Constitution imposes limitation upon the amount of debts a county may legally incur, i. e., three and one-half per centum of the assessed value of the property therein.

Sec. 215 of the Constitution provides that a county shall not in any one year impose a greater rate of taxation than one-half of one per centum on the taxable property therein, except that in the cases of public buildings, bridges and roads an additional one-fourth of one percentum may be levied. It is not to be understood from this, however, that the limit imposed by said Section 224 can in any case be transcended (except in the one particular to be hereafter noted). See *O'Rear v. Sartin*, 193 Ala. 275 (69 So. 554).

It has been held by our Supreme Court in *Brown v. Gay-Padget Hardware Co.*, 188 Ala. 423 (66 So. 161), which was approved in *O'Rear's* case *supra*, that when a county has reached the limit set by said Sec. 224, it may nevertheless contract for and incur ordinary current obligations in anticipation of the revenues for the current tax year but any obligations beyond this are void. In other words, the law says that when the constitutional limit has been reached the county must live within its revenue and pay as it goes. The current tax revenues are however considered *pro hac vice* to be funds *in esse*. This rule springs from necessity, otherwise a county as a political arm of government would be powerless to function at all or to meet actual and imperious necessities.

With the foregoing statement by way of premise I shall attempt to answer Judge Vaughan's letter, with an application to the concrete facts set out as he requests.

He says the assessed valuation of property in the county (Dallas) for the year 1919 amounts to the sum of \$15,450,000. Three and one-half per cent on this would establish \$540,750.00 as the constitutional limit. Against this, there is outstanding a bonded indebtedness of \$450,000 and interest bearing warrants and accounts for various purposes of \$225,000 or a total indebtedness of \$675,000, thus being \$134,250 in excess of the constitutional limit.

He says:

"The income from taxes for the year 1918-19 will be approximately \$112,000, other revenues approximately \$15,000, making total revenues \$127,000."

This \$134,250 excess of debt—or a considerable portion thereof—I understand was incurred in previous years for actual and ordinary debts for current expenses within the rule as above set out, but that instead of discharging these current debts out of each year's revenues as should have been done, the funds were diverted to other purposes thus leaving on the county's hands outstanding obligations lawfully contracted but not paid.

I am of opinion that if these current necessary obligations at the time they were contracted were within the annual income (and hence valid contracts, under the rule above referred to), that they are none the less valid and subsisting obligations because still unpaid. The dereliction of any public official or officials cannot impair the obligation of contracts solemnly and legally entered into by diverting funds to improper uses. The offending officials it may be are liable on their bonds for paying void obligations not within the rule of current ordinary obligations—depending of course upon the particular facts of the case; however this raises another question foreign to the present and immediate inquiry.

I understand from Judge Vaughan that the county has in bank a fund of \$25,000 which comes over from last year's tax year, i. e., 1917-18, accumulated by dint of strict economy and discounting current bills, and he desires to know if the County may apply this or any portion thereof towards the retirement of the valid, subsisting and outstanding obligations. I think it may. Care should be observed, however, to ascertain that the claims audited and allowed

by the Board of Revenue are such as are protected by the rule above referred to.

If it should be made to appear either from the face of the claim or the record of the court (Board of Revenue) that the claim is void, then it would cease to be a ministerial function on the part of the Probate Judge to draw his warrant, and assuming any warrant to be void it would be the duty of the Treasurer to refuse payment thereof.

Very truly,
RICHARD EVANS,
Assistant Attorney General.

INFERIOR COURT OF DECATUR:—Has jurisdiction of justice of the peace court, and cannot try misdemeanor cases. Fine imposed in such court for doing business without license is null and its remission is not ground for action on judge's bond.

July 14, 1919.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol, City.

Dear Sir:

Your letter of the 8th inst., transmitting two letters of inquiry of Examiner C. C. Brooks, has been referred to me for reply.

It appears from this correspondence that the Judge of the Inferior Court of Decatur undertook to try and did try one Stanley Roberts, for doing business without a license—made a misdemeanor by Sec. 7 of the License Act (Acts 1915, p. 529),—and imposed a fine of \$25.00 (the amount of the license) which fine was subsequently remitted.

You desire to know if the Judge is not liable for failure to collect this sum and whether he may not be sued on his bond. You also desire to know if the Local Act creating the Inferior Court of Decatur (Local Acts 1915, p. 227) is constitutional and whether it was amended by Gen. Acts 1915, pp. 817-823.

The jurisdiction of the Inferior Court of Decatur is that of a Justice of the Peace. This proceeding was not a civil action as for debt to recover the amount of the license tax but a criminal prosecution. The criminal jurisdiction of a

Justice of the Peace is set forth in Code Sec. 6733 and a Justice has not the jurisdiction to hear and determine a misdemeanor of this character. Not having jurisdiction of the subject matter, the judgment was wholly void. There is a rule that where a Justice arrogates to himself a jurisdiction he does not possess and as a proximate consequence of his assumption of authority, a party before his so-called court is injured, the injured party may sue for his damages sustained. In the use of the term "so-called court," I mean that it is no court at all, under such circumstances, and the acts are those of an individual and not a judge—*Coram non iudice*. Duffin vs. Summerville, 9 Ala. App. 573; S. C. 187 Ala. 403.

It is true that the statute does not authorize the remission of the fine but then there was no fine to remit—being a nullity. The injured party—if any—would have been the defendant had he paid his fine.

Here neither the State nor the County could maintain an action. Should either or both sue as for money had and received, either or both would be cast in the suit—the answer being the Justice didn't receive any; on the other hand, should an action of covenant be brought on the bond, the bondsmen would simply reply the Justice had no jurisdiction on the subject matter to collect the \$25.00; in other words, the attitude of the letter is that Mr. Brooks complains that the Judge did not consummate his usurpation and collect the \$25.00. I do not think the Judge liable to either the State or the County.

In the view I take of the matter, an answer to your other questions, relative to the Constitutionality of the Act and its subsequent amendment as to the Solicitors' fees would be purely academic and serve no useful purpose, and I take the liberty of passing them by.

Respectfully,

RICHARD EVANS,
Assistant Attorney General.

INFERIOR COURT OF JEFFERSON COUNTY:—Judge does not have to account for fees received for performing marriage ceremony or for acknowledging instruments.

July 19, 1919.

Hon. Jos. R. Tate,
Solicitor 10th Judicial Circuit,
Birmingham, Alabama.

Dear Sir:

In response to your inquiry for an opinion whether judges of the Inferior Court in Jefferson County are required to pay into the public treasury:

- (1) Fees received for performing the marriage ceremony;
- (2) Fees received for acknowledging instruments.

I beg to advise that I am of the opinion that neither of these fees are such fees as are required to be accounted for by such judges and paid into the public treasury. The marriage ceremony performed by such judges is a semi-ecclesiastic duty which can be performed as well by a minister of the Gospel as by a public officer. The taking of acknowledgments is a notarial duty that comes down from the old Roman law, and when needed in connection with some transaction can be performed just as validly in one county as in another. I can find no intimation anywhere that the Legislature ever had these fees in mind when it said that where public officers draw salaries, all fees and costs shall be paid into the public treasury, and to so hold in the face of long established custom regarding these fees as such as do not have to be accounted for, would be too hypercritical to be justified.

Yours truly,

J. Q. SMITH,
Attorney General.

INSURANCE:—Guaranty companies writing official bonds are required to make deposit under section 1513 of Code as amended, and if deposit is not made Insurance Commissioner must revoke license to do any business in the State.

July 25, 1919.

Hon. L. Y. Dean,
Commissioner of Insurance,
Capitol, City.

Dear Sir:

The Attorney General's office is in receipt of your letter asking whether it is mandatory upon the Commissioner of Insurance to revoke the license of a foreign guaranty company which for consideration has become surety on official bonds without depositing in trust Fifty Thousand Dollars of securities with the State Treasurer. In reply, I beg to advise:

Code Section 1509 as amended by Acts '09, page 331, requires that foreign corporations (becoming surety on official bonds or bonds required in judicial proceedings mentioned in Code Section 1507) shall deposit in trust with the State Treasurer the sum of Fifty Thousand Dollars of securities as a condition precedent to qualify as a foreign corporation authorized to become surety on official bonds.

Code Section 1513 as amended by Acts '09, page 333, provides:

"The insurance commissioner shall at any time, on becoming satisfied that any corporation is insolvent, or cannot be safely accepted as surety upon the instruments hereinbefore provided for, or upon such corporation failing on demand to furnish the insurance commissioner full and satisfactory information touching its business, securities or investments or upon such corporation violating any of the provisions of this article, revoke the authority of such corporation to transact any new business in this state; and thereupon the right of such corporation to transact any new business shall cease, and it shall not thereafter be allowed to transact such business until it has again received from the insurance commissioner another certificate of the character hereinbefore prescribed."

Code Section 1523 as amended by Acts '09, page 336 makes inapplicable the provisions requiring a deposit as to companies not writing official bonds or bonds in judicial proceedings.

Code Section 7006 as amended by acts '09, page 336, makes it a misdemeanor for guaranty companies to carry on business without obtaining a certificate from the Commissioner of Insurance or to carry on business after such certificate is revoked, but that any bond written shall be valid.

Code Section 1516 also provides that any corporation writing an official bond shall be estopped to deny its validity or the power of the company to execute the same.

The charter provisions of the Company (American Bonding & Casualty Co.), as filed in the office of the Commissioner of Insurance, provide, inter alia, that the Company shall have authority:

(1) To insure the fidelity of any persons holding places of private or public trust, or execute as surety any bond or other obligation required or permitted by law to be made, given or filed except bonds required in criminal causes and may issue policies insuring the fidelity of any person, partnership or corporation, or any one in their employ and County Treasurers and also insure titles of real property and guarantee abstracts of title thereof.

(2) (Applies to Health & Accident Insurance.)

(3) (Applies to steam boiler insurance.)

(4) (Burglary insurance.)

As I understand the facts, the Company has written about nine official bonds without making the deposit required and it is now insisted by counsel for the company that the authority of the commissioner is measured by Code Section 4551, having to do with revoking or suspending licenses of foreign insurance companies, and not by Code Section 1513 as amended. In other words, since under Code Section 1523, the above requirements of "Article 5" (Code Sections 1507-1524) apply only to official bonds; those guaranty companies qualified to write unofficial bonds are perforce governed and controlled by said Code Section 4551, which is applicable generally to foreign insurance companies.

I am unable to agree with this view. The rule is that a specific statute prevails over a general one, if both are germane or related to the same subject matter.

It will be observed that the penalty authorized by Section 4551 is less severe than Section 1513, and if the contention of counsel be correct a foreign guaranty company writing official bonds might circumvent and nullify the statute (Sec. 1513) by merely qualifying to write unofficial bonds without the deposit and if caught up with, escape the penalty visited by Section 1513. The Statute is clear that a failure to qualify by making the deposit carries the penalty for an infraction of Section 1513.

The question then turns upon what is the correct construction of Code Section 1513. I am of the opinion that the language and intent of this section, as amended by Acts 1909, page 333, is mandatory and the power of the Commissioner is not one of discretion as to whether he should suspend or revoke the license as is the case in Section 4551. If the Commissioner should find that the Statute has been violated, it would be his duty to revoke the authority of the Company to do business in this State.

Respectfully,

RICHARD EVANS,

Assistant Attorney General.

BOARD OF CONTROL AND ECONOMY:—Contract with Fostoria Lamp Company, section 2, fixes minimum amount to be purchased at \$2,500 list price, and not net price.

July 25, 1919.

Hon. W. D. Nesbitt,
Board of Control and Economy,
Capitol.

Dear Sir:

I beg leave to acknowledge receipt of your letter of July 25, with contract of the Fostoria Incandescent Lamp Division, in which you asked to be advised as to the meaning of Paragraph 2 of said contract, and whether or not the \$2500.00 stipulated as the minimum amount to be bought under the contract is calculated on a basis of the list prices as named in the catalogue of the Company, or is it calcu-

lated on the basis of the list prices less the discount of 29% named in the contract.

In reply I beg to advise that in my opinion under Section 2 of said contract, the amount to be bought is calculated on a basis of the list prices as named in the catalogue, and is not to be calculated on the basis of the list prices less the discount of 29% named in the contract.

I am returning contract herewith.

Very truly yours,

J. Q. SMITH,
Attorney General.

CORPORATIONS:—On renewal or extension of charter, new charter fee is to be paid only if capital stock is increased.

July 26, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

In reply to your inquiry of July 26, in which you ask whether on an application by a corporation to renew or extend its charter under Section 3462 of the Code, there should be collected from the corporation a charter fee, as in the case of original incorporation, as required by Section 3450, or a charter fee on the increase of capital stock as required by Section 3453 of the Code:

I am of the opinion that where a corporation renews its charter under Section 3462 of the Code, without increasing its capital stock, no provision is made for the collection of a charter fee. However, if there is an increase in the capital stock, a fee should be collected on the increased amount of capital, as provided by Section 3453 of the Code. In order to collect fees on renewal of charters, there would have to be an express provision to that effect in the Statute, and there appears to be no such provision.

Yours truly,

J. Q. SMITH,
Attorney General.

COUNTY EXPENSE:—Plat books not to be made annually but only when needed.

July 29, 1919.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol, City.

Dear Sir :

Replying to your communication of this date enclosing a letter from Probate Judge E. A. Hammett of Talladega County, with reference to allowance of bill for making a Plat Book for the year 1917, I beg to advise :

Section 55 of an Act approved September 14, 1915, entitled "An Act to provide for the assessment valuation and equalization of values of real and personal property for taxation," &c., (Acts 1915, pp. 386 et seq. (410-411) provides :

"It is the duty of the tax assessor of every county in this State to procure at the expense of the county a book in the form to be prescribed by the State Board of Equalization, in which he shall enter a complete map and list of all the blocks and lots which have been platted, and the maps of which are recorded in the office of the judge of probate or can be procured within his county, beginning with the lowest numbered block and lot and proceeding in numerical order to the highest, with the name of the owner set opposite each block and lot. Each subdivision or addition to any town or city shall be shown by proper headings at the top of each page of such lot book, and by an index in the front thereof, provided that if such plat books have already been made, the assessor shall annually make the entries thereon without compensation."

Section 56 of said act provides :

"The assessor shall make a complete plat book or books of all real estate in his county, unless such book or books have already been provided, in a form to be prescribed by the State Board of Equalization, in which the name of the owner shall be entered on each separate plat or subdivision where the same is practicable.

The Court of County Commissioners, or court of like jurisdiction, shall pay the assessor for making out the plat book required by this and the preceding section, a sum not exceeding one hundred dollars in counties of twenty-five thousand inhabitants, and upwards, and fifty dollars in counties of less than twenty-five thousand inhabitants."

The duty required of the Tax Assessor by the above sections to make a complete Plat Book is enjoined as a positive duty "unless such book or books have already been provided," and if already provided "the assessor shall annually make the entries thereon without compensation."

This does not contemplate a new plat book each year but only when and as a new one may from usage be required. When such necessity exists the compensation for "making out the plat book" is specified in Section 56. And I am of the opinion that when the Court of County Commissioners or Board of Revenue, as the case may be, passes upon and allows the bill for "making out such plat book" the same is a valid charge against the county, as allowed, unless in excess of the amount authorized by Section 56.

Respectfully,

J. Q. SMITH,
Attorney General.

SCHOOLS; COUNTY EXPENSE:—County Board of Education has no power to employ an accountant to examine books of county superintendent, that being the duty of the county auditor.

July 31, 1919.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol, City.

Dear Sir:

The Attorney General's office is in receipt of your communication of the 30th inst., enclosing a letter from Mr. B. G. Wilson, of Walker County, upon which you desire an opinion.

He asks:

"Has the County Board of Education of Walker County a right to hire an accountant to examine the

books of the County Superintendent of Education of Walker County and to pay for such services out of the school funds of the County? Walker County has an Auditor whose duty is to examine the books of the County Officers, there are also state examiners whose duty it is to examine the books of the different officials of the State."

In reply, I beg to refer you to the case of *Walker v. Bridgforth*, 9 Ala. App. 257 (62 So. 323); This case would seem to be decisive of the question.

There the court held that the County Commissioners could not contract for the services of an attorney to prosecute a violation of a road law, since the law provided a solicitor whose duty it was to perform this function.

On the authority of this case, I advise that the Board of Education was without power to legally contract for an audit of the books of the County Superintendent of Education when this duty is specially enjoined upon the County Auditor pursuant to Local Acts '07, page 143, Section 4.

I herewith return the letter of Mr. Wilson.

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

BANKS:—State banks may subscribe to stock of corporations engaged in whole or in part in cotton export business.

July 31, 1919.

Hon. D. F. Green,
Superintendent of Banks,
Capitol.

Dear Sir:

In reply to your inquiry whether State Banks may subscribe to the capital stock of a corporation engaged in the business, in whole or in part, of holding, marketing or exporting cotton from the United States, etc., to a foreign country, beg to advise that inasmuch as Section 3518 of the Code provides that incorporated State Banks and Trust Companies may buy and sell stocks and bonds, I see no reason why they may not subscribe to the capital stock of

said cotton market corporation, as you suggest, unless prohibited by some provision in their charters, which does not give way to the provisions of Section 3518 of the Code. There being no express prohibition in the Statute, I see no reason why private State Banks may not likewise subscribe to stock in such corporations.

Very truly,

L. E. BROWN,
Assistant Attorney General.

STATE INSTITUTIONS; TUBERCULOSIS SANATORIUM:—Board of Trustees was given power by statute to purchase lands but not to sell same.

August 7, 1919.

Dr. S. W. Welch,
State Health Officer,
Capitol.

Dear Sir:

I beg leave to acknowledge receipt of your letter of August 4, in which you asked to be advised as to whether or not the Board of Trustees of the Tuberculosis Sanatorium has authority of law to sell the property, consisting of five hundred acres of land in Cullman County, which was purchased by said Board of Trustees some years ago. This Board of Trustees is provided for in Article Five of Code of 1907. Section 777 provides for the selection and purchase of said land, but does not give the Board of Trustees authority to sell or dispose of said property.

I am of the opinion and so advise that it would require an Act of the Legislature giving the Board of Trustees authority to sell or exchange said land.

Very truly,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS:—A sheriff filling an unexpired term may not receive increased compensation which would not have been available to his predecessor. Appointments are not complete until commission is issued.

August 7, 1919.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol, City.

Dear Sir :

Your communication of the 4th inst., enclosing a letter from Examiner C. C. Brooks has been referred to this office for opinion and reply :

The question propounded by Mr. Brooks is as follows :

“On the 25th day of January, 1919, a man was appointed to fill the unexpired term of a sheriff who had resigned and his commission was issued on the 30th of the same month. Would he be entitled to receive the increased fees fixed by the Act approved January 27, 1919—Acts 1919, p. 4, amending Code Section 3722?”

When a state or county officer requires a commission (and a sheriff does require a commission, Code Section 1469), the “appointment” is not perfected or consummated until the commission is issued. Our Supreme Court, in Draper’s case, 175 Ala. 547 said :

“The appointment becomes complete when the last act required of the appointing power is performed. In cases where a commission is required the appointment is complete when the commission is signed by the executive and sealed if necessary and is ready to be delivered or transmitted to the appointee.”

It would, therefore, follow that the “appointment” was not legally made or consummated until the issuance of the commission on the 30th, which was subsequent to the approval of the Act in question. Consequently, the appointee could not participate in the increased fees.

Assuming, however, that the commission was signed and ready for delivery prior to the approval of the Act in question, I am still of the opinion that he could not participate

in the increase allowed. I do not find any authority in this State directly in point; and there seems to be a difference of opinion in the authorities of other state having a constitutional provision similar to ours.

Section 281 of our Constitution provides that:

"The salary, fees or compensation of any officer holding any civil office of profit under this State or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

The question then arises: What is meant by the phrase "during the term for which he shall have been elected or appointed?"

Code Section 1474 provides:

"Vacancies in all state and county offices are filled by appointment of the Governor, except as otherwise provided; the appointees must be commissioned, and they shall hold their offices for the unexpired term, and until their successors are elected and qualified."

The terms of all sheriffs are fixed by Statute (and the Constitution) at four years and expire simultaneously. The Constitution (Section 96) further provides:

"The Legislature shall not enact any law not applicable to all the counties in the State, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

If the inhibition against increasing fees, etc., is not applicable to the whole term of four years, then we would have the anomaly in Alabama of one set of fees prevailing in one county and another set in another county; Section 96 of the Constitution to the contrary notwithstanding.

Constitutions, no less than other instruments, should be read and interpreted as a whole, not as "word catchers who live on syllables" but in a broad and liberal spirit; so as to effectuate the true intent and practical operation designed by its framers. That construction, at least, should be employed that makes for a homogeneous whole and preserves a harmonious operation.

Consonant with the view that the word "term," (as used in Section 281 of the Constitution) means the whole of the regular term, there may be cited:

Throop on Pub. Officers, Sec. 465,
Larew v. Newman, 81 Cal. 588,
Starke v. Gaux, 129 Cal. 526 (62 Pac. 68),
State v. Farmer, 271 Mo. 306 (196 S. W. 1106),
29 Cyc. 1427-9.

This construction finds further support in the fact that our Supreme Court has held that an appointee filling out an unexpired term, as sheriff, is eligible to succeed himself (Black v. Pate, 130 Ala. 514), whereas, the sheriff elected for the full term is not under Section 138 of the Constitution. In other words, under the Court's ruling in Black v. Pate, supra, the appointee of the fractional term is filling out some one's else term.

I am aware there is some difference of opinion among lawyers, and even judges, on the point ruled on herein. I am of the opinion, however, that the view hereinabove expressed is the better considered view point.

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

COUNTY EXPENSE:—Claims upon which the Court of County Commissioners are not authorized to pass are not barred by section 150 of Code. Witness tickets presented for registration after seven years may be paid from fine and forfeiture fund.

Hon. Chas. E. McCall, August 7, 1919.
Chief Examiner of Public Accounts,
Capitol, City.

Dear Sir:

This office is in receipt of your communication of the 6th inst., desiring to know:

First: Whether the County Treasurer of Henry County is authorized to pay a witness ticket presented for registration on July 1, 1919, in a case wherein the State failed to convict on to-wit, December 15, 1912.

Second: Can said Treasurer pay a witness ticket presented for registration on July 1, 1918, in a case wherein

the State failed to convict at the Spring term of Henry County, 1916?

In other words, does Section 150 of Code of 1907 bar payment of these claims?

Replying to your inquiry, I beg to advise: Code Section 150 is not technically a statute of limitations but rather one of non-claims and is analogous to the statute requiring presentation of claims to an administrator within a prescribed time, and providing that on failure to be so filed, they shall be barred.

Montgomery County v. City of Montgomery, 195 Ala. 197 (202).

As said in Ensley Motor Car Co. v. O'Rear, Treasurer, 196 Ala. 478 (481),

"All fines go to the county—Code 1907, Sec. 6888. It is conceded that while the Fine and Forfeiture Fund is a county fund, yet the manner of its disposition resides in the Legislature and the Commissioners Court has no control of it.—Sanders v. Court of County Commissioners, 117 Ala. 543. The provisions of the Code above cited disclose that the Legislature has prescribed how this fund shall be disbursed."

The amount of witness fees is made by the Statute a fixed and certain charge against the Fine and Forfeiture Fund for the payment of state witnesses in cases where the State fails to convict. It is not within the competency or a matter addressed to the Board of Revenue or the Court of County Commissioners to pass upon or allow these claims.

It is also made the duty of the Clerk of the Court, under Code Section 6666, to certify witness tickets, and when so certified, under Code Section 6660 are made a charge against the Fine and Forfeiture Fund upon proper presentation for registration.

I am, therefore, of the opinion that Code Section 150 referred to in your letter is inapplicable to the case of certified witness tickets, and does not operate as a bar, in that class of claims upon which the Board of Revenue or the Court of County Commissioners is not authorized to pass.

Respectfully,

J. Q. SMITH,
Attorney General.

BOARD OF CONTROL AND ECONOMY:--Emergency purchases may be made without advertising for bids and making contract.

August 8, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

This office is in receipt of your letter of August 7, requesting an opinion, first, as to whether the State Auditor has authority to draw a warrant in payment of stationery that was not embraced in a contract regularly awarded for the printing of stationery to be used by the State; and second, if so, by what authority can such stationery be purchased, and third, by whom should the requisition be approved before the State Auditor can legally draw a warrant? In reply thereto, we advise as follows:

First. Section 69 of the Constitution of 1901 provides that:

"All stationery * * * used in the legislative and other departments of Government shall be furnished and the printing * * * shall be performed under contract to be given to the lowest responsible bidder below a maximum price and under such regulations as shall be prescribed by law * * * and all such contracts shall be subject to the approval of the Governor, auditor and Treasurer."

In construing this provision of the Constitution, our Supreme Court, in the case of *Brown & Co. v. Seay*, 86 Ala., p. 124, said:

"The provision is not legislative in its nature, nor is it a negative or prohibitory clause, which of itself declares the law. It establishes a principle but does not provide the means requisite to carry it into effect. Doubtlessly, it was the intention to impose a duty on the General Assembly, and to require the enactment of legislation on the particular subject of the public printing. The requirement, however, has only moral force, no rule for the enforcement of the duty being provided. The provision in terms contemplates and provides for supplemental legislation--'shall be per-

formed under contract, and under such regulations as may be prescribed by law.' Not doing anything which it declares shall be done, it is not self-executing, but expends its whole force in commanding legislative action. Being merely mandatory, it is inoperative until aided by legislation, and is operative only to the extent the supplemental legislation imparts vitality."

It would, therefore, appear that if it is provided by statute for the purchase of stationery in a way and manner otherwise than the method indicated in this Section of the Constitution, such action would be regular, the Constitutional provision seemingly to the contrary, notwithstanding.

Second. By an act approved February 13, 1919, creating a State Board of Control and Economy, that Board is authorized to prescribe rules and regulations, with the approval of the Governor, for emergency purchases without advertisement for bids. And it is further provided in Section 13 of said Act that the Board shall be purchasing agent for stationery for use in the several state offices

I am, therefore, of the opinion, that the State Board of Control and Economy has the right to make an emergency purchase of stationery without advertising for bids or procuring the same under contract, provided such purchase is made under rules and regulations by it prescribed and approved by the Governor; and further, that said Board is a tribunal whether or not said purchase was an emergency purchase.

I am further of the opinion that the requisition should be approved by the Board and the Governor, and that when this is done, the Auditor can legally draw a warrant for the payment of the indebtedness incurred.

Very truly yours,

J. Q. SMITH,
Attorney General.

TAXATION; CONSULAR OFFICERS:—No statutes in this State exempt property of American or foreign diplomatic and consular representatives, but the general law of the land accords exemption of property belonging to such officer as representative of his government. He acquires no domicile unless clear proof to the contrary is shown.

Hon. William P. Cobb,
Secretary of State,
Capitol, City.

Aug. 12th, 1919.

Dear Sir:

In reply to your oral request for information, I beg to advise:

There is no statute in this State dealing specially with the question of taxation as applied to American Diplomatic or Consular officers residing abroad, or, on the contrary, to Foreign Diplomatic or Consular officers residing or stationed in this State.

It is the general law of the land, however, that the person and personal property of a diplomatic representative accredited to this Country belonging to him as a representative of his sovereign are not subject to taxation, otherwise, no exemption from taxes is accorded him. A different rule obtains, however, where the diplomatic representative has acquired a domicile in this country (2 C. J. 1303, Sec. 24). The same exemption usually applies to Consuls—who are largely commercial representatives. (2 C. J. 1305, Sec. 29).

Diplomatic representatives, Consuls and other persons in governmental service are deemed to acquire no domicile at the place where they actually reside in the absence of the clearest proof of a contrary intent.

14 Cyc. 850.

Respectfully,
J. Q. SMITH,
Attorney General.

DOG LAW:—Turkeys are not live stock within the meaning of the statute.

Mr. J. H. Pinson,
Geiger, Alabama.

August 18, 1919.

Dear Sir:

I beg leave to acknowledge receipt of your letter of August 11, in which you make the inquiry as to whether or not

a turkey killed by dogs would come under the head of live stock as provided by Acts of the Legislature of 1915, pp. 599 and 600. In reply I beg to advise that in my opinion turkeys are not live stock as contemplated in said statute. The dictionary defines the turkey as being a fowl, and our Supreme Court has held that the dog was not live stock. I am, therefore, of the opinion that a turkey killed by dogs would not come under the purview of this statute.

Very truly yours,

J. Q. SMITH,
Attorney General.

COUNTY BONDS:—A county that has reached the constitutional debt limit may not issue bonds previously authorized.

Aug. 18th, 1919.

Hon. R. L. Bradley,
State Treasurer,
Capitol, City.

Dear Sir:

The Attorney General's office is in receipt of your communication of the 15th inst., transmitting a letter of inquiry from J. H. Hilsman & Co. (stock and bond brokers) of Atlanta. These brokers desire to be informed as to whether this office would pass favorably upon the validity of certain county bonds—yet unissued—if the same should be deposited as securities with the Department of Insurance.

It is beyond the duties of this office to pass upon the validity vel non of a proposed bond issue for prospective bond dealers or purchasers.

Since you have forwarded the request for advice, I will say unofficially for your own information that it is my opinion that the issue of the residue (or additional) bonds previously authorized by the voters would be invalid.

I understand the facts to be that the county in question (Chilton) has already reached its constitutional limit. After this limit has been reached, no new debts may be created—as a bond issue would necessarily involve.

The rule that current obligations may be contracted within the assessment already made does not apply to this

case. The issue of bonds creates a further *debt*; the rule of current necessity merely appropriates and anticipates the existing and current revenues. In other words, taxes for the current year are pro hoc vice considered to be funds in esse and available under the rule of "pay as you go."

The principle under discussion is discussed in *Brown, Treasurer, v. Gay-Padgett Hardware Co.*, 188 Ala. 423. On page 431 of this case the Supreme Court says:

"We think it is clear, also, that such a county cannot *borrow money* even to provide funds for current and necessary municipal expenses."

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

SHERIFFS:—Feed bills are not properly chargeable against the fine and forfeiture fund.

August 19, 1919.

Hon. C. C. May,
Circuit Clerk,
Greenville, Ala.

Dear Sir:

This office is in receipt of your communication of the 12th inst., requesting an opinion. I beg to advise:

The circuit clerk cannot issue executions for feeding prisoners under Code Section 6638 as amended by Acts 1911, p. 41, unless a conviction follows. The charge for feeding prisoners is primarily upon the State (to be paid as provided by Code Section 6646) and it is reimbursed by collection from the prisoner if solvent upon execution following upon a conviction. The Section 6638, *supra*, as amended, provides that the sheriff shall be paid for feeding prisoners held under any "indictable" offense; what offenses are indictable are prescribed by Code Section 7129—which include all felonies and misdemeanors; prosecutions by way of appeal as from a violation of a municipal ordinance, are quasi criminal only and are not comprehended in the above section.

The law of costs is penal (Code Section 6631) and no fee is chargeable against the Fine and Forfeiture Fund

unless expressly so provided by the statute (*Banks v. Mobley*, 4 Ala. App. 510); feeding of prisoners is not technically a "fee" but rather an "allowance" (*Stone v. Holcomb*, 72 So. 536). Code Section 6889 provides that in certain contingencies certain items of cost (mentioned therein) shall be a charge on the Fine and Forfeiture Fund "*unless the payment or distribution of such funds are otherwise provided for.*"

Code Section 6638 as amended by Acts 1911, p. 41, and Code Section 6646 do provide how bills for feeding prisoners shall be paid—directing that the State Auditor draw his warrant on the State Treasury, &c.

I am, therefore, of the opinion that "feed bills" of sheriffs are not properly chargeable against the Fine and Forfeiture Fund.

Respectfully,
J. Q. SMITH,
Attorney General.

COUNTY EXPENSE:—A typewriter is included within the term "stationery and supplies," and may be furnished to official court reporter under section 7 of Act of 1915, page 589.

August 25, 1919.

Mr. E. P. Kingsbery,
Official Court Reporter,
Huntsville, Ala.

Dear Sir:

You desire to know whether a typewriter furnished an official court reported under Section 7 of an act entitled "An Act to provide for the appointment of an official court reporter," etc., approved September 25th, 1915 (Acts 1915, p. 589), may be charged as stationery against the counties of his circuit upon the proper certificate from the Circuit Judge.

Your attention is called to the case of *Underwood Typewriter Company v. Marengo County Bank*, 82 So. 158, wherein the Supreme Court, upon application for certiorari held that a typewriter was stationery within the statutory requirement providing that stationery be furnished to public officials.

I see no difference in principle between the statute passed upon in said case and the requirements of Section 7 of the act *supra*. The act in question is somewhat broader than the act referred to in the said case, as the language of the act is "All stationery *and supplies*" shall be furnished, etc.

On the authority of the Underwood Typewriter Company v. Marengo County Bank, *supra*, I am of the opinion that it is the duty of the counties of the circuit, upon certificate of the Circuit Judge, to supply a typewriter as necessary stationery or supplies.

Very truly yours,
RICHARD EVANS,
Assistant Attorney General.

SENTENCES:—Where aggregate sentences to hard labor exceed two years the prisoner may be sentenced to the penitentiary under section 7620 of the Code.

August 28, 1919.

Hon. G. W. Weaver,
Probate Judge of Shelby County,
Columbiana, Alabama.

Dear Sir:

Your communication of the 26th inst. to the Attorney General's office asking for opinion and reply. You desire to know the proper procedure with reference to sentencing a prisoner in two cases where the aggregate sentence to hard labor together with the fine exceeds two years, etc. In reply, I beg to advise:

In the Phelps case the Court of Appeals held that where the aggregate punishment in more than one case exceeds two years the prisoner should be sentenced to the penitentiary under Code Section 7620 and not under Code Section 6583. See Phelps v. The State, 75 So. 877; affirmed on application for certiorari by the Supreme Court, 76 So. 997.

If you will read over Phelps's case I think it will answer the questions propounded in your letter.

Very truly yours,
J. Q. SMITH,
Attorney General.

CORPORATIONS:—Building and loan associations are not required to pay charter fees.

August 28, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

In reply to your letter of August 28, in regard to the fee to be paid where the capital stock of a building and loan association is increased, I beg to advise that it does not appear that this charter fee which under Section 3453 of the Code is to be collected from corporations of a general nature, applies to building and loan associations, which are not incorporated as are corporations of a general nature, that is, under Section 3445 et seq., but they are incorporated under Section 3597 et seq. It does not appear that it was intended that building and loan associations were to pay the charter fees provided for general corporations. The fee is expressly placed on Mutual Aid Corporations by Section 3578 of the Code and if it had been intended to place it on Building and Loan Associations a similar provision would have been contained in the Article of the Code providing for the incorporation of such associations.

Yours very truly,
J. Q. SMITH,
Attorney General.

SENTENCES; FINE AND COSTS:—Fine is part of punishment.

September 4, 1919.

Hon. G. W. Weaver,
Judge of Probate,
Columbiana, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 30th ult., asking if the imposition of a fine of \$500.00 was "part of the punishment" in a case where you had imposed a sentence of twelve months hard labor and a fine of \$500.00.

In reply I beg to advise:

Code Section 7620 reads in part as follows: "The only legal punishment besides removal from office and disqualification to hold office, are fines, hard labor," etc. I am of the opinion that the fine is part of the punishment.

Code Section 7634 sets out the imprisonment for non-payment of the fine.

You do not mention in your letter the date of your judgment of conviction. If it is still within the current monthly term so that you have jurisdiction over it, you should properly resentence the prisoner in accordance with Phelps Case, 75 So. 876.

Yours truly,
J. Q. SMITH,
Attorney General.

UNITED STATES GOVERNMENT RESERVATION:—State should not undertake to exercise criminal jurisdiction upon government reservation.

September 5, 1919.

Hon. Henry Jones,
Circuit Solicitor,
Sheffield, Ala.

Dear Sir:

Mr. Shaw, Deputy Solicitor, has submitted to me a communication dated August 30, 1919, by Hon. Earle Pettus, United States District Attorney at Birmingham, to Lieut. Colonel Clement, Ordnance Department, U. S. Army, Muscle Shoals, Ala., with the request that this office advise you as solicitor and Mr. Shaw as deputy solicitor, whether or not the State authorities are authorized to enforce the criminal statutes of the State within the United States Government Reservation at Muscle Shoals, Alabama.

In view of the holdings of the Supreme Court of the United States in the cases of *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, and *Western Union Telegraph Co. v. Chiles*, 214, U. S. 274, I do not think that I would be justified in taking any other position than that the State should not undertake to exercise any criminal jurisdiction upon the Reservation in question, and I so advise.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

PROHIBITION LAWS:—In unsuccessful condemnation cases the law makes no provision for charges for feeding and care of live stock. In successful cases charges are paid from proceeds of sale and not from the Governor's law enforcement fund.

Sept. 6, 1919.

Hon. Edward C. Betts,
Deputy Solicitor, Madison County,
Huntsville, Ala.

Dear Sir:

In your letter of the 1st inst. you propound the following queries:

1st. Where, upon seizure by the Sheriff under process issued pursuant to the act commonly known as the Bone Dry law (Acts 1919, p. 6), the property is not condemned to the State upon the hearing, is there any authority for the Court to authorize or direct the storage charges or other fees of the sheriff to be paid out of any fund?

2nd. Would an account by the Sheriff duly verified and presented to you (Attorney General) for approval be paid by the Governor out of the law enforcement fund, accruing from *successful* condemnation proceedings under said act?

In reply, I beg to advise:

The law of fees and costs is strictly construed, and before an officer can claim such he must be able to point to some statute of authorization.

Northern Ala. Ry. Co. v. Lowery, 57 So. 260.

The Bone Dry law makes no provision for fees, costs or charges against the State where no conviction is had or condemnation of the *res* follows. Since the law makes no special provision, where there is no condemnation, the only relief available to guard against running up charges for feed and care of mules and horses would be to secure an order of sale as in the case of perishable property attached or *in custodia legis* (McCreery v. Berney Nat. Bank, 116 Ala. 224, 22 So. 577); then too, the Sheriff might rent out the animal if he saw fit to do so.

Your second question is predicated upon a successful termination or decree of condemnation. In the event of forfeiture to the State or condemnation of the *res* the statute expressly provides for payment out of the proceeds for the expense of seizure and keeping; See Sec. 13 of said Act.

The "law enforcement fund" is under and subject to the

supervision and control of the Governor (see Sec. 13 of said act). He may (pursuant to Sec. 14 of said Act) offer rewards, stating the amounts thereof to be paid to sheriffs, constables or other persons, who *bring about convictions, etc.*, but this is applicable to rewards, the costs are paid out of the proceeds when the condemned *res* is sold, as a matter of course and independent of any action of the Governor.

Trusting that this may answer your inquiries, I am,

Very truly yours,

RICHARD EVANS,
Assistant Attorney General.

SCHOOL SYSTEM:—County school funds may be used for co-operative work between county board of health and county board of education for public school inspections.

Dr. S. W. Welch,
State Health Officer,
Capitol.

Sept. 11th, 1919.

Dear Sir:

In reply to your inquiry of April 8th, 1919, beg to advise that under the authority of the Act approved August 16th, 1915, County Boards of Education have entire control of public school funds of the county, except as otherwise provided by law. If they have funds available, I see no reason why they should not appropriate them for the purpose of co-operative work between the County Board of Health and County Board of Education for the purpose of public school inspection.

Very truly yours,

L. E. BROWN,
Assistant Attorney General.

CHILD LABOR LAW:—Boy of 15 not permitted to be employed on boat engaged in navigation or commerce.

Dr. Glenn Andrews,
State Inspector,
Capitol.

Sept. 12th, 1919.

Dear Sir:

I beg to acknowledge receipt of your letter of September 12th, enclosing a letter from Miss Augusta B. Martin, In-

spector of Child Labor, requesting an opinion of this Department as to whether or not it is a violation of Section 5 of an act of the Legislature of 1915, page 194, to employ a boy of fifteen years of age to run a launch back and forth across the Mobile River, carrying employees of a shipbuilding company.

I am of the opinion and so advise that Section 5, Subdivision 4 prohibits any child under sixteen years of age from being employed upon any vessel or boat engaged in navigation or commerce within the jurisdiction of this State.

Very truly,
J. Q. SMITH,
Attorney General.

SCHOOL SYSTEM:—Funds derived under special school tax amendment of 1916 are available for expenses of year before, if such use was submitted to the voters at the time the election was held.

Sept. 15th, 1919.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

In reply to your inquiry of September 15th, beg to advise that under the 1915 Educational Act of the Legislature, the control of the funds derived under authority of the Special School Tax Amendment, voted November 7th, 1916, is under the exclusive control of the County Board of Education and the only limitation upon its use is "That the purposes thereof shall have been first submitted to the vote of the qualified electors of the county." So that if the purposes enumerated in your letter are included within the purposes for which the tax was voted, then I see no reason why they may not be used to pay expenditures contracted during the year previous to that in which the tax is collected.

Yours truly,
L. E. BROWN,
Assistant Attorney General.

INSURANCE; WORKMEN'S COMPENSATION:—Employer may either insure or carry his own risk. His policy may carry excess insurance. Company carrying the insurance must be qualified to do business in Alabama.

September 18, 1919.

Hon. L. Y. Dean,
Commissioner of Insurance,
Capitol.

Dear Sir:

Your communication of the 13th inst., to the Attorney General's office for opinion and reply.

I beg to advise as follows:

Section 30 of the Act approved August 23, 1919, (Acts 1919, p. 229) commonly referred to as the Workmen's Compensation Act, provides:

"Every employer who accepts the provisions of this act relative to the payment of compensation may at his option insure and keep insured his liability thereunder in some insurance corporation, association, organization or insurance association or corporation or association formed of employers and workmen or formed by a group of employers to insure the risks under part 2 of this act operating by the mutual assessment or other plans or otherwise, provided, such insurance association, organization or corporation shall have first had its contract and plan of business approved in writing by the commissioner of insurance of Alabama and have been authorized by said insurance commissioner to transact the business of workmen's compensation insurance in this State and under such charter or plan. Those writing such insurance shall in every case be subject to the conditions of this section hereinafter named."

It will be observed from this that it is left to the option of the employer as to whether he will insure his risk or carry it himself.

You also desire to know if an employer may carry an "excess compensation policy," i. e. insure his liability in excess of an upset figure with a limited maximum.

Again Section 30, *supra*, provides:

"Nothing herein contained shall prevent an employer from insuring only a particular class or classes of employees or class, form or kind of risks all or any part thereof or from limiting such insurance either as to maximum or taking out insurance policies with such other limitations as are authorized by law or from carrying catastrophe insurance."

Our Compensation Act is largely written or adapted from the Minnesota Act. The language of the Minnesota Act (Sec. 31a) is:

"But nothing herein contained shall prevent an employer from insuring only a particular class or classes of employees or risks."

Our Act, as will be noted, reads "class, form or kind" of risks and adds in addition "*all or any part thereof or from limiting such insurance as to maximum or taking out insurance policies with such other limitations as are authorized by law or from carrying catastrophe insurance.*"

I am of the opinion that it would be within your province to pass upon and to allow a form of policy that would allow insurance of all or a part of the risk, or carrying "excess insurance," i. e. in excess of an upset figure (either carried by the employer or in another company) and limited to a specified maximum liability.

It is to be noted, however, that said section provides: "The insurer *must be* one authorized by law to conduct such business *in the State of Alabama,*" etc.

You ask if insurance may be written under Code Section 4581, i. e. in foreign insurance companies not licensed to do business in Alabama, upon the insured reporting and paying one per cent on the gross premium. The answer is obvious from the above quotation from Section 30. The act provides (inter alia) that the insurer shall have first had its contract and plan of business approved in writing by the Insurance Commissioner, authorizing the writing of compensation insurance (Sec. 30 *supra*) and also upon compliance with the requirements of the statute (to insure in a company authorized to do business in this State) that any actions brought shall be against the insurer instead of the employer, which compliance ipso facto works a release

of the employer. It is further provided, however, that if the insurer cannot be reached by due diligence by process *in this State* the employer shall not be released nor shall he be released if an execution be returned wholly or partly unsatisfied against an insurance company authorized to write compensation insurance.

I am, therefore, of the opinion that in order for the exemption and benefits to accrue to the insured (employer), the contract of insurance must be in accordance with the provisions of the statute.

Very respectfully,
RICHARD EVANS,
Assistant Attorney General.

SCHOOL SYSTEM; COUNTY BONDS:—County school warrants, if statutory requirements have been met, may be issued by county boards and have same effect as county warrants.

September 18, 1919.

Hon. Spright Dowell,
Superintendent of Education,
Capitol, City.

Dear Sir:

Your communication of the 12th inst. contains the following query:

"Please advise me whether under the amendment (H. 493) of section six of S. 82 a county Board of School Commissioners may issue and sell warrants which shall be legal obligations of the issuing board, all requirements of the act and amendment having been complied with."

In reply I beg to advise:

Section six of the act approved Feb. 13, 1919, entitled "An Act to provide for elections to authorize any county", etc. (Acts 1919, p. 58) as amended by the act approved August 5, 1919, (Acts 1919, p. 190), provides (inter alia):

"The county board of education, in order to erect, repair, enlarge or equip school buildings, or to make other improvements in the school facilities of the

county or to raise money for any of such purposes, is hereby authorized and empowered to issue school warrants bearing interest at a rate not to exceed 6% per annum for an amount, including interest, not exceeding the income from said tax levy, estimating such income upon the basis of the assessed value of the taxable property in such county for the preceding tax year as the annual return for such levy for the period for which such warrants are issued; and the board of education of any county or of any city of 2,000 or more inhabitants in order to erect, repair, enlarge or equip school buildings or to make improvements in the school facilities of any school district under its control in which a district school tax has been or is being levied, or to raise money for any of such purposes, is hereby authorized and empowered to issue school warrants bearing interest at a rate not to exceed 6% per annum for an amount, including interest, not to exceed the income from such tax levy, estimating such income upon the basis of the assessed value of the taxable property in such city or school district for the preceding tax year, as the annual return from such levy for the period for which such warrants are issued. The due date of said school warrants shall not extend beyond the 30th day of September next after the time when the tax for the last year of said levy shall become delinquent. All warrants shall be signed in the name of such board, by its president and shall be a preferred claim upon the proceeds of said tax levy in such county or school district, as the case may be, each year during the period for which such warrants are issued to the extent of the warrants maturing during such year, and such board shall at the beginning of each tax year, by resolution entered upon its minutes, set apart so much of the tax income for that year as will be necessary to meet all warrants maturing during that year."

The creation of and the powers vested in County Boards of Education are embodied in the Act approved August 16, 1915, entitled "An Act to provide for a County Board of Education, etc." (Acts 1915, p. 281).

Section 5 of said Act provides (inter alia) :

"That the County Boards of Education shall have entire control of the public schools (unless otherwise provided by law) within their respective counties. * * * The Board shall have the right to acquire, purchase, by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes * * * To sue and contract, all contracts to be made after resolutions adopted by the Board and spread on its minutes and signed by its president."

Section 6 of said act provides (inter alia) that said Board shall "have entire control of the public school funds of the county except as otherwise provided by law."

It will be observed from section 6 of the Act first above quoted and set out that the Legislature has conferred the power upon County Boards of Education to issue interest bearing warrants in instances and under conditions set out in said Act.

If compliance with the statutory requirements be had the warrants of the County Board would be of similar force and effect that county warrants would be.

Your question asks if such warrants when issued "shall be legal obligations of the issuing Board?" Technically speaking county warrants (or in this instance district school warrants) are not per se contractual obligations; they are merely orders from one duly authorized officer to another, to pay from county funds a specified sum. They are not assignable in the sense of commercial paper so as to authorize a suit on the contract by the assignee and no protection is accorded an innocent purchaser.

Savage v. Matthews, 98 Ala. 535 (537);

Littlejohn v. Littlejohn, 195 Ala. 614 (617).

They import, however, prima facie, though not conclusively, that the claims or matters calling forth the county warrants (or orders) are valid (*Savage v. Matthews*, supra; *Norwood v. Goldsmith*, 168 Ala. 224, 238). For practical purposes, however, they may be regarded as a prima facie liability against the county.

It is entirely within legislative competency to authorize County Boards as bodies of political subdivisions to issue warrants unless restrained by some constitutional limitation or restriction.

Section 222 of the Constitution provides that the Legislature may authorize counties, cities, towns, villages, *districts or other political subdivision* to issue bonds when authorized by a majority ballot of the qualified electors, etc., but it was held that this limitation was applicable to bonds and not warrants.

Littlejohn v. Littlejohn, 195, Ala. 614.

It has been repeatedly held that counties may issue interest bearing warrants (unless the limit of indebtedness under Constitution Section 224 has been reached).

Board of Revenue v. Farson, 197 Ala. 375;

Littlejohn v. Littlejohn, 195, Ala. 614;

O'Rear v. Sartain, 193 Ala. 275;

Town of Eutaw v. Coleman, 189 Ala. 165 (177);

Talley v. Co. Com. of Jackson Co., 175, Ala. 644;

Matkin v. Marengo Co., 137 Ala. 155.

School districts placed under the control and supervision of County Boards of Education are political subdivisions created by the Legislature and I know of no constitutional impediment in the way of legislating as to such political subdivisions and the Boards thereof when enacted under a *general law*.

I conclude, therefore, that County Boards of Education acting in full compliance with the statute may lawfully issue interest bearing school warrants pursuant to the authorization of Section 6, *supra*.

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

SCHOOL SYSTEM; TAXATION:—After three-mill school tax is voted for, the Board of Revenue makes the levy and authorizes the Assessor to assess same, and the Tax Collector makes collections the following October.

September 22, 1919.

Hon. J. S. Grubbs,
Tax Collector, Barbour Co.,
Clayton, Ala.

Dear Sir:

Your letter of the 15th inst., has been received. Your attention is invited to Code Section 635, setting out the

duties of the Attorney General, and you will observe therefrom that no written opinions except those specified in said section have the sanction of law as an official opinion. However, at your request I am writing you my opinion of the matter proposed in your letter.

As appears from your letter Barbour County voted in June 1919, a 3-mill school tax. Following upon the voting of this tax the Board of Revenue of said county pursuant to Section 7 of an act entitled "An Act to provide for elections to authorize any county of the State to levy and collect a special county tax for public schools," approved February 13, 1919, made a levy of said special school tax of 3 mills. It is specially provided by section 7 that when said levy shall have been made by the Board of Revenue it shall "cause the tax assessor to assess the same on the taxable property in said county or in said school district as the case may be, which shall not exceed 30c on each \$100.00 worth of taxable property," etc. By the terms of Section 8 of said act it is provided "that whenever such a levy as is provided for in this act is made it shall be the duty of the tax collector within and for that county to collect such a tax in the same manner and under the same requirements and laws as the taxes of the State are collected and he shall keep said amount separate and apart."

It will be seen from the above quotation that it is first made the duty (after the tax is voted in) of the county commissioners or board of revenue to make a levy of said tax and thereafter cause the tax assessor to assess the same, and it is made the duty of the tax collector to proceed to collect such a tax in the same manner and under the same requirements and laws as the State taxes. Following this specific instruction it would be the duty of the tax assessor after the levy is ordered by the board of revenue to proceed on the first day of October as required by law in the levying of State taxes to assess the property liable therefor and thereafter (if effect is to be given to the language of the act requiring the tax collector to collect such tax in the same manner and under the same requirements and laws as the State) the tax collector would on the following October proceed to collect the same as he does other taxes.

If you will read Sections 7 and 8, of the Act approved Feb. 13, 1919 (Acts 1919, p. 62) authorizing counties to

vote this tax, I think you will have no difficulty in arriving at the intent of the law.

Yours truly,
J. Q. SMITH,
Attorney General.

PROHIBITION LAWS:—\$50 informers' fee not payable from convict fund because not expressly provided.

Hon. G. N. Cofield,
Sheriff, Randolph County,
Wedowee, Alabama.

September 22, 1919.

Dear Sir:

Your communication of the 17th inst., has been received.

I beg to advise that this office has heretofore given an opinion that the \$50.00 allowance as informer's fee under Section 10 of the Act commonly referred to as the "Bone Dry Law" (Acts 1919, p. 11), cannot be collected, except under execution, unless aided by supplemental legislation.

A fine of \$50.00 authorized by Section 10 is for conviction in cases of unlawfully distilling or manufacturing; by Section 15 of said Act distilling or manufacturing is made a felony, and if this \$50.00 informer's fee is taxed up as other costs, then you would have to either collect, as said above, upon execution, or else get the costs out of the convict fund as in other felony cases.

This fee of \$50.00 is nowhere made a charge upon any fund, and since the law of costs is strictly construed, and funds like convict funds and the fine and forfeiture fund are the special creatures of statutes, and are strictly construed, it would follow that in order to make this item, or any other, properly chargeable as an item of cost against any fund, it would have to be expressly provided for by statute. *Banks v. Mobley*, 4 Ala. App. 510 (58 South 745). As neither of these funds make any provisions for this fee it cannot be read into either of them. It would require remedial legislation to amend the convict fund so as to make the item payable out of that fund.

Very truly yours,
J. Q. SMITH,
Attorney General.

COUNTY COURT; CIRCUIT CLERK:—Circuit Clerk is required to keep such records of county court as were formerly kept by the Probate Judge acting as his own clerk.

September 23, 1919.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol, City.

Dear Sir:

Replying to your recent communication asking what books and records are required to be kept by the circuit clerk acting as ex officio clerk of the county court pursuant to statute imposing such duties upon him, approved August 22, 1919 (Acts 1919, p. 200), I would advise as follows.

The jurisdiction of the County Court as re-established pursuant to the Act to that end (Acts 1915, p. 862), is in nowise increased; the jurisdiction is confined to the trial of misdemeanors. The procedure is as formerly, which required that proceedings be initiated by warrant; there is no provision for presentation by a grand jury of an indictment. Appeals are taken to the Circuit Court and tried *de novo*. Upon such appeal the transcript to be made out and returned to the circuit court is provided for by Code Section 6726.

Formerly the probate judge, as ex officio judge of the county court, was required to act as his own clerk; the enabling provisions of the new act approved August 22, 1919, provide that the circuit clerk shall ex officio act as and be the clerk of the county court. It is not incumbent upon the clerk of the county court to keep all records in that court that he is required to keep as clerk of the circuit court. He is required to keep such records as were formerly kept by the judge of the county court acting as his own clerk.

Respectfully,

J. Q. SMITH,
Attorney General.

VOCATIONAL EDUCATION; DEPARTMENTAL EXPENSE:—

Office furniture may be paid for from fund appropriated for vocational education.

September 26, 1919.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

I am in receipt of your inquiry of September 24th, and in reply I beg to advise that I see no reason why the office furniture in question purchased in connection with the maintenance of an office for the Board of Vocational Education shall not be paid out of the Vocational Fund set apart under the act approved February 15, 1919, to provide for Vocational Education (Acts 1919, p. 80), inasmuch as the Act provides that necessary expenses shall be paid from the funds appropriated.

Very truly yours,
J. Q. SMITH,
Attorney General.

SCHOOL SYSTEM; ELECTIONS:—Delay of four days in canvassing returns will not invalidate the election.

September 26, 1919.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

Referring to your inquiry of September 20, in regard to the special school election held on August 8, 1919, in Putnam School District, in Marengo County to determine whether or not a special tax of three mills should be levied for school purposes within said district, I beg to advise that I think it is the duty of the Commissioners Court at the first available opportunity after the receipt of the returns to canvass and declare the result of the election, notwithstanding more than four days have elapsed since said election occurred, as this will not invalidate the election.

Very truly yours,
J. Q. SMITH,
Attorney General.

CONVICTS; SENTENCES:—Prisoner electing to serve sentence and declared not guilty on appeal, is entitled to be paid earnings without deduction for maintenance. Convict serving two or more indeterminate sentences, parole may be granted on first term though convict proceeds immediately to serve succeeding sentence without release.

September 26, 1919.

Hon. C. B. Rogers,
President Board of Convict Inspectors,
Capitol, City.

Dear Sir:

The Attorney General's office is in receipt of your two communications of the 23d instant, in both of which you ask for opinion and reply.

The questions propounded are as follows:

1st. "The case of Perry Glass, Chilton County, has been reversed and his attorneys have called upon this department for the amount he earned as a State Convict, he having elected to serve his sentence pending appeal.

"In making up the statement of this account, we find that, after deducting the expense of transferring, feeding, clothing, etc., he earned practically nothing. His attorneys are contending that he should be paid for the amount the State received for his labor without regard to the expense the State was put to for maintaining him."

2d. "Under Section 6575 of the Criminal Code of 1907 the costs in succeeding cases where a convict is sentenced in more than one case cannot be paid until he has served the preceding sentences.

"We would thank you to advise us when the costs in succeeding cases shall be paid where a convict has received an indeterminate sentence in each of several cases."

Replying seriatim, I beg to advise:

If the Court on appeal holds that a convict was improperly convicted there is no warrant or authority conferred by statute to mulct such discharged convict for the amount of his food or keep while incarcerated in the penitentiary. The fact that a statute permits a convict sentenced to

"elect" to enter upon the service of his sentence pending his appeal (Code Section 6577) does not alter the rule. The cost of maintenance of a penitentiary is a public expense and unless the law makes provision for a charge against a prisoner you have no right or authority to charge up against him his pro rata part of the expense of maintenance.

If a prisoner elects to go and serve his sentence pending an appeal and is declared not guilty on appeal I am of the opinion that the earnings of the convict provided by Code Section 6577 to be paid to him on reversal means the amount earned by him without deduction or abatement for his keep or maintenance and the word "proceeds" as used in that section does not mean "clear proceeds" or "net proceeds" but the proceeds of his labor without deduction for board or clothes.

In regard to your second question I beg to advise as follows:

Code Section 6519 provides:

"When a convict is sentenced to imprisonment in the penitentiary on two or more convictions the imprisonment on the second and on each subsequent conviction must commence at the expiration of the imprisonment on the preceding conviction."

Code Section 6575 (inter alia) provides that the *costs* in a succeeding case shall not be paid until the convict has served his sentence in the preceding case.

The question then arises: Where there is an indeterminate sentence in a preceding case, when does the sentence end within the meaning of Code Section 6575 for the purpose of paying costs in a succeeding case?

The indeterminate sentence act (approved February 18, 1919) provides that upon the expiration of the minimum sentence it shall be the duty of the Warden of the Penitentiary to send the record of the prisoner in question to the Board of Pardons and if said Board is of opinion that the prisoner in question is entitled to a parole, it shall order or authorize such, but the maximum sentence continues, nevertheless (technically), and said prisoner may be re-arrested thereunder if he violate his parole.

Manifestly (however) where there is a second sentence to be served the prisoner would still remain in custody and there would be no occasion for re-arresting him.

While the statute is silent as to any direction under the conditions supposed in your question, I think the spirit and intent of the law-making body was that a parole (if found to be proper or desirable) was to all practical intent and purposes the "expiration of the imprisonment on the preceding conviction" as said in Code Section 6519 (*supra*).

I am therefore of opinion that where the Board of Pardons orders or authorizes a parole on the convict's record of good behavior the second or succeeding term within the meaning of Code Section 6575 begins and costs should accordingly be paid.

I am of opinion that this is in keeping with the spirit and intent sought to be subserved by the lawmakers. If this construction should not obtain we would be presented with the anomaly of a prisoner being at large under parole in the first case notwithstanding there were other sentences hanging over him unsatisfied.

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

SCHOOL SYSTEM; OFFICE HOLDERS:—Member of the Legislature that fixes compensation for county school board of which he is also a member cannot draw the new salary during his term, and is therefore not holding two offices of profit under the State at the same time. But he may not succeed himself in both offices.

October 4, 1919.

Hon. Spright Dowell,
State Superintendent of Education,
Montgomery, Alabama.

Dear Sir:

I have your letter of the 2d inst., in which you state that Hon. Nathan L. Miller and Hon. C. R. West are members of the State Senate and that they are also members of the Jefferson County Board of Education; that the new school code provides that members of the county board of education shall receive a per diem of five dollars for a total of not more than twelve days for services as members of the county board of education, in addition to expenses incurred in attending the meetings of the board; and ask whether these gentlemen can legally hold both offices at the same

time, or whether it will be necessary for each of them to resign one of the offices.

In reply to your inquiry will state that several sections of the Constitution of Alabama contain provisions bearing upon this question, as follows:

Section 59. "No Senator or Representative shall during the term for which he shall have been elected, be appointed to any office of profit under this State, which shall have been created, or the emoluments of which have been increased during such term except such offices as may be filled by election by the people."

Section 68. "The Legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee or allowance to any public officer, servant or employee, agent or contractor after service shall have been rendered or contract made, *nor to increase or decrease the fees and compensation of such officers during their terms of office,*" etc.

Section 280. "No person holding an office of profit under the United States, except post masters, whose annual salaries do not exceed two hundred dollars, shall during his continuance in such office hold any office of profit under this State; *nor unless otherwise provided in this Constitution, shall any person hold two offices of profit at one and the same time under this state,* except Justices of the Peace, Constables, Notaries Public and Commissioners of Deeds."

Section 281. "The salary, fees or compensation of any officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

I do not think Section 59 referred to contains any provision which interferes with the right of either of the parties to hold both offices as they were elected by the people.

Section 68 provides that the Legislature shall have no power to increase or decrease the fees and compensation of officers during their term of office and Section 281 contains a similar provision.

Inasmuch as members of county boards of education did not receive any compensation prior to the new school code, no provision having been made therefor, I am of the opinion that the two members of the county board referred to, could not legally accept the compensation provided for by the new school code, since to do so would violate the provisions of these Sections and Section 280 of the Constitution. I do not think, however, that they would be disqualified to continue to hold office as members of the county board of education for the remainder of their term, without the acceptance of the per diem and expenses provided for by the new school code for the reasons stated below.

Section 280 provides that no person shall hold two offices of profit at one and the same time under this State, unless otherwise provided under the Constitution except Justices of the Peace, Constables, Notaries Public and Commissioners of Deeds.

In *Spelling on Extraordinary Relief*, Vol. 2, Section 1780, cited in the case of *Montgomery v. State*, etc., 107 Ala. 380, the following appears:

“There are three principal tests for determining whether one performing duties of a public nature is a *public officer* in the sense of subjecting his incumbency or employment to a *quo warranto proceeding*; first whether the sovereignty either directly or through legislative enactment or executive appointment, or indirectly, as through a municipal charter, is the source of authority; second, whether the duties pertaining to the position are of a public character—that is, due to the community in its political capacity; and third, whether the tenure is fixed and permanent for a definite period fixed by law, unless for neglect of duty or malfeasance, or subject to termination at the will of others without the assignment of cause.”

Under the definition of a public officer just quoted, members of the Legislature and members of a county school board are undoubtedly public officers, and as compensation is provided for each of the offices, they are at present offices of profit. I do not think, however, that they are offices of profit as to these two parties, or that they will become offices of profit until after the expiration of their present terms for the reason stated below.

Summarizing the facts and the law involved, I am of the opinion:

First; that because of the inhibition contained in Sections 68 and 280 of the Constitution against increasing the compensation of an officer during his term of office, the parties are not legally entitled to receive any compensation during the remainder of their respective terms of office as members of the board of education, as they received no compensation prior to the enactment of the new school code, and the provisions for compensation will only be effective as to their successors;

Second; Since they are not entitled to receive any compensation for the remainder of their respective terms, their offices will not be offices of profit during their present terms, and they are therefore not ineligible to continue to hold both offices until the termination of their present terms as members of the board of education;

Third; that neither of them will be legally entitled to continue as members of the board of education at the end of their present terms, provided they are at that time, members of the legislature.

Yours very truly,

J. Q. SMITH,
Attorney General.

CIRCUIT COURTS; TRIAL TAX:—\$3 trial tax provided in 1919 revenue law to be collected in cases filed after approval of the law.

October 4, 1919.

Mr. A. H. Shepperd,
Clerk and Register of the Circuit Court,
Anniston, Alabama.

Dear Sir:

I beg to acknowledge receipt of your letter of October 2, in which you ask this office to advise you as to the meaning of Section 41½ of the Revenue Law of 1919 (Acts 1919, p. 284), as to whether or not it applies to cases already filed, or only such cases as may be brought after the passage of said law. Section 41½ reads as follows:

“Section 41½. That a trial tax of \$3.00 be, and the same hereby is, imposed in each case, civil, criminal

and equity, which *hereafter* goes upon the docket of any circuit court in this State to be taxed and collected as other costs, and when collected, to be paid by the clerk of such court, into the general funds of the State Treasury."

I am of the opinion, and so advise, that this trial tax of \$3.00 should be taxed in each civil, criminal and equity case filed since the approval of this Act, on September 15, 1919.

Very truly yours,

J. Q. SMITH,
Attorney General.

TRIAL TAX:—\$3 trial tax provided by 1919 revenue law applies in proceedings to remove disability of minors and to obtain right to re-marry.

October 6, 1919.

Hon. Hunter Armstrong,
Register in Chancery,
Birmingham, Ala.

Dear Sir:

I beg to acknowledge receipt of your letter of October 3, in which you ask this office to advise you whether or not the tax of \$3.00, as provided in Section 41½ of the Revenue Code of 1919, applies to petitions for the removal of disabilities of minors and petitions for the right to re-marry.

I am of the opinion, and so advise, that Section 41½ of the Revenue Code of 1919 (Acts 1919, p. 284), applies to petitions for the removal of disabilities of minors, and petitions to re-marry. These are unquestionably cases in equity as provided in Section 41½ of said Act.

Yours truly,

J. Q. SMITH,
Attorney General

STATE HEALTH DEPARTMENT; LICENSES:—Judgment for damages in civil case not sufficient per se to justify revocation of physician's license.

October 6, 1919.

Hon. S. W. Welch,
State Health Officer,
Capitol, City.

Dear Doctor:

I have examined Code Sections 1637 and 1638 as amended by Act April 5, 1911, (Acts 1911, p. 234 et seq.) particularly with reference to the right and power of the Board of Medical Examiners to revoke the license of an offending physician who is guilty of any of the acts specified in Section 1637 as amended.

Section 1638 provides (inter alia) that the Board shall have the power to revoke, without hearing, the license of a physician,

“Whenever it has been established by the judgment of a court of competent jurisdiction that a physician has committed any of the acts or come within any of the disabilities enumerated in the preceding section; the filing of a certified copy of such judgment with the Board shall be sufficient to justify the revocation of his license without further hearing,” etc. Acts 1911, p. 238.

This contemplates a judgment convicting or adjudging the physician guilty of the acts—or any of them—specified in Section 1637. A civil action recovering damages as for abortion would be a money judgment and would not within the intent and meaning of the Act, in my judgment, be such a judicial ascertainment as would convict the offending physician. The judgment, as said above, would be that the plaintiff have and recover so many dollars damages; if he had been criminally proceeded against for performing a criminal abortion and been convicted, then it would have been a case in point.

I am of the opinion that in order to proceed against the physician in Blount County, you would have to proceed by giving the requisite notice accompanied by copy of the com-

plaint and proceed as provided by Code Section 1638, as amended by Acts 1911, p. 235 et seq.

Respectfully,

J. Q. SMITH,
Attorney General.

JEFFERSON COUNTY; SOLICITOR'S FEES:—After January, 1917, solicitor's fees above amount for expense fund go into State treasury. Solicitor's fees taxed in municipal court should be paid into county treasury.

October 6, 1919.

Judge Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol, City.

Dear Sir:

In your communication of the 16th ult., to the Attorney General's office you ask whether the solicitors' fees taxed up in Jefferson County Courts (both at Birmingham, the county site, and at Bessemer) belong to the State, since the solicitor and his assistants are paid salaries by the State. I am directed by your letter to confine my answer to and following the year 1917.

By Act approved February 28, 1887, Acts 86-87, p. 996, the Solicitor of Jefferson County was put upon a salary and his fees were covered into the general fund of the county.

By Act approved February 18, 1891, Acts 90-91, p. 1148, the County Commissioners of Jefferson County were required to appropriate annually, the sum of \$3,000.00 to be used in suppressing crime and out of which the solicitor might employ an assistant and stenographer, after paying \$500.00 to the Circuit Solicitor for ex officio services.

By Act approved February 18, 1897, Acts 96-97, p. 1121, it was provided that after paying the solicitor's salary and his fund for suppressing crime the balance should be paid into the "Fine and Forfeiture Fund."

By Section 11 of an Act entitled "An Act to amend An Act" entitled "An Act to establish the criminal court of Jefferson County," etc., approved December 7, 1900, Acts 1900-01, p. 212, it was provided:

"That the solicitor of Jefferson County shall have the power to employ any assistance he may require to

properly administer justice and the expenses incurred by him therein shall *be paid out of the solicitor's fund* of said county. The Board of Revenue of said county are authorized and they are hereby required to appropriate out of the solicitor's fund any amount necessary, in addition to the amount now appropriated or authorized to be appropriated by law for the payment of such assistance, such amount to be paid upon the affidavit of the solicitor that the same was necessary."

By Act approved September 25, 1915, Acts 1915, p. 817, salaries are provided to be paid the Circuit Solicitor, the Deputy Solicitor at Bessemer, and the assistant solicitors, provisions being made as to the manner of payment.

Section 10 of said Act provides: "All general, local or special laws establishing the office of county solicitor or the office of solicitor of any court by whatsoever name called, except circuit solicitors, and all general, local or special laws in conflict with any of the provisions of this Act are hereby expressly repealed; and all provisions of such local act or acts, as well as all of the provisions of all other *local or special acts applicable to such county solicitor or solicitors of any court in such county which are not in conflict herewith are hereby made applicable in all things to the circuit solicitor of the county where such local acts apply just as fully and to the same extent as they now apply to such county solicitor or the solicitor of any court in such county.*"

Code Section 7792 provides: "All fees which may be by law taxed as solicitors' fees against defendants on convictions secured by a solicitor who is paid a salary by the State, belong to the State and when collected must be paid into the State Treasury."

It will be noted from Section 10 (of the 1915 Act), *supra*, that while the county solicitor is abolished, all the enabling acts with reference to his duties and powers are expressly retained and made applicable to the Circuit Solicitor, and in the case of State *ex rel.* Jefferson County *v.* Waldrop, 79 So. 483 (484) the court said:

"It is perfectly clear, however, that the other specially granted powers of the *county* solicitor viz: the power to employ a clerk or stenographer for his own

office, and 'to incur any expenses he may deem necessary to properly administer justice,' are by Section 10 of the Solicitor's Bill preserved in favor of the Circuit Solicitor, and now vested in him. The argument is, that the preservation of these special powers preserves also, by necessary or by reasonable implication, the fund out of which the expenses resulting from their exercise were to be paid, viz, the solicitor's fund derived from solicitors' fees paid into the county treasury. Certainly it must have been the legislative intention that these special expenses should be paid; and, as no provision is made for their payment otherwise, we must presume that they were to be paid, as formerly by *the county* out of a solicitor's *fund*, to be now derived from fees earned by the *circuit holder*. To this extent such fees, *after payment to the county*, must be appropriated to the payment of the expenses incurred by the *circuit solicitor* as authorized by law and certified by him. But when this has been done the "applicability" of the special local laws cease, and Section 7792 of the Code requires that the residue of such fees be paid into the State Treasury. This, it seems to us, is the only logical solution of the legislative tangle in which the subject has become involved."

The Local Act, approved July 9, 1915, Local Acts 1915, p. 23, so far as it applies to the employing of assistants by the *County Solicitor* is inapplicable, but in all other respects the said Act obtains and applies to the Circuit Solicitor, enabling him, as said in said act, "to incur any expenses he may deem necessary to properly administer justice * * * * such necessary expenses shall be paid out of the solicitor's fund of said county provided there is sufficient amount in said fund to pay said expenses," and "provided further, if there is not a sufficient amount in said solicitor's fund to pay such expenses at said time, the Treasurer of Jefferson County is hereby authorized and required to pay said amount or amounts out of the general fund of Jefferson County:" provided however, that "the amount so drawn or expended out of the general fund shall not exceed the sum of \$5,000.00 in any one year."

The Supreme Court, defining the "solicitor's fund" of Jefferson County, in the case of *Henry v. State Ex rel. Welch*, 76 So. 417, (420) said:

"In short, the solicitor's fund is the fund earned as fees by solicitors whether it be thereafter made a part of the general fund, or of the fine and forfeiture fund, or a special fund for the use of the county solicitor. It relates to and is co-extensive with the source of its derivation, rather than its final legislative destination or disposition which may be changed from time to time. But, if there were any substantial doubt as to the inherent meaning of the phrase "solicitor's fund," we think it would be resolved in favor of the construction stated in view of the very nearly, if not quite, uniform practice of the officers of Jefferson County in so keeping and dealing with it for a great many years. We conclude, therefore that the two acts in immediate question are intended to devote to the uses therein named *all the solicitors' fees collected in Jefferson County, including those collected in the circuit court, and also those collected in convictions secured by the county solicitor's assistants*, who are authorized by law to conduct prosecutions in his name and stead. Whether, if valid acts, they effect an entire repeal of the act of February 18, 1897, Acts 1896-97, p. 1121, covering annual balances of solicitors' fees into the fine and forfeiture fund, we are not now called upon to determine."

In light of the above considerations I am of the opinion that the fees of the circuit solicitor taxed up in convictions had in the courts of Birmingham and Bessemer constitute the "solicitor's fund" against which he may "incur expenses as he may deem necessary to properly administer justice" as authorized by the terms of said Local Act 1915, p. 23, except that he may not pay out any sum for the hire of assistant or Deputy Solicitors (whose services are otherwise provided for by General Acts 1915, p. 817, et seq.); the expenditures of the solicitor, however, shall not exceed the maximum limit of said "solicitor's fund" in any one year.

In Waldrop's case, the court in construing the "applicability" of local laws as applied to the Circuit Solicitor and particularly with reference to the disposition of his fees, said:

"But when this has been done" (i. e. the payment to the county of enough fees to meet the expenses of the

solicitor) "the 'applicability' of the special, local laws cease and Section 7792 of the Code requires that the residue of such fees be paid into the State Treasury. This it seems to us is the only logical solution of the legislative tangle in which the subject has become involved."

Upon the authority of this case I accordingly advise that the amount of the (Circuit) solicitor's fees over and above the limit or amount authorized for his expenses (herein above set forth) belong to the State and should pursuant to Code Section 7792 be paid into the State Treasury. Consonant with this holding all fees of the circuit solicitor, the "Deputy Solicitor of the Circuit" at Bessemer and the assistants to the Solicitor at Birmingham, who are paid a salary by the State, belong to the State—after turning in the requisite amount for the solicitor's expense fund as aforesaid.

The Consolidated Court Act went into effect on the first Monday after the second Tuesday in January, 1917, consolidating all courts of record into the circuit court. My understanding is that the then County Solicitor resigned August 1, 1917, so that, for a portion of the year 1917, to-wit; up to August 1st, of that year, the county solicitor and his assistants prosecuted cases, but that after August 1, 1917, the office of County Solicitor became vacant. I am of the opinion that fees of the County Solicitor or his assistants in cases prosecuted by him or them were payable to the county, going into the "Fine and Forfeiture Fund:" cases, however, at any time in 1917 or subsequent—prosecuted by the Circuit Solicitor, his deputy or assistants, who were paid salaries by the State, should have been covered into the State Treasury (after the requisite fees constituting the expense fund as aforesaid).

You also ask about solocitor's fees in the inferior court designated as the Municipal Court of Birmingham (Local Acts 1915, p. 231).

By the terms of an Act approved September 25, 1915, entitled "An Act to regulate inferior courts in cities having more than 35,000 population," &c. (Acts 1915, p. 825) it is provided in Section 10 thereof that the Board of Revenue may fix and provide a salary or salaries for such number of deputy solicitors to prosecute misdemeanors as the Board

of Revenue may deem proper and that there shall be taxed in each misdemeanor case prosecuted by him the same solicitor's fee that is authorized to be taxed in such case in the county courts of the State and that the fee shall be collected by the clerk of the Municipal Court and paid into the County Treasury.

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

CIRCUIT COURTS; COURT REPORTERS:—Supernumerary judge is required to appoint official court reporter for 19th circuit, and counties composing the circuit are required to pay pro rata portion of salary of such reporter.

October 7, 1919.

Hon. F. Loyd Tate,
Supernumerary Judge of the State of Alabama and
Acting Judge of the 19th Judicial Circuit,
Wetumpka, Alabama.

Dear Sir:

I am in receipt of your letter of October 7, 1919, asking for an opinion as to whether or not you have the legal right, and if it is your duty to appoint an official stenographer for the 19th Judicial Circuit; and as to whether or not it would be the duty of the treasurers of the several counties, comprising said circuit, to pay said stenographer his salary, as provided by an Act approved September 5, 1919.

Beg to advise you as follows:

An Act "to further prescribe the duties of the Supernumerary Judge of Alabama" approved September 29, 1919, (Acts 1919, p. 704.), expressly provides:

"That the Supernumerary Judge, in addition to his other duties, shall perform the duties of Circuit Judge of the 19th Judicial Circuit."

An Act approved September 5, 1919 (Acts 1919, p. 268), amending An Act approved September 25, 1915, which said Act applies to the appointment, etc., of official court reporters, expressly provides in Section 1 of said Act:

"That each of the judges of the circuit courts of this State is hereby authorized and directed to appoint a

competent shorthand writer to perform the duties of official court reporter of the courts in the circuit over which said judge presides."

Said Act further prescribes in Section 5:

"That the official court reporter shall receive a salary of eighteen hundred dollars per year, payable in monthly installments by the counties composing the circuits, each county to pay its pro rata of such salary based upon the assessed taxed valuation of all property of such county for the preceding year; such payment to be made on certificate issued by the judge of the court in favor of such official reporter for the respective amounts due by the several counties each month, the same to be paid by the treasurer of each county out of the general funds thereof on presentation in the same manner as jurors' certificates are now paid."

It is, therefore, my opinion, that it is not only your legal right, but it is your duty under the Acts above referred to, to appoint an official court reporter for the 19th Judicial Circuit, and that it is the duty of the treasurers of the several counties comprising said circuit, to pay the salary of said reporter appointed, as provided for in said Section 5 above quoted.

Yours truly,
J. Q. SMITH,
Attorney General.

COUNTY COURTS; CIRCUIT CLERKS:—Clerk of county court may not perform acts of judicial nature, such as issuing warrants of arrest on affidavit.

October 7, 1919.

Hon. James L. Ormon,
Deputy Solicitor,
Russellville, Ala.

Dear Sir:

You ask whether the act approved Aug. 22, 1919 (Acts 1919, p. 200), repealing Code Section 6698 and making cir-

cuit clerks ex-officio clerks of the county courts authorized the clerk of the county court to administer oaths and take affidavits and issue warrants of arrest.

In reply, I beg to advise:

The clerk of the county court may administer oaths or affidavits and issue writs that involve purely ministerial acts, but where the administering oath on an affidavit or other paper involves an act of a judicial nature, the judge only may act; e. g., the administering of an affidavit under Code Section 6703 involves a judicial act since it must be on probable cause as a prerequisite and sine qua non to a lawful complaint authorizing the issuance of a warrant of arrest.

In Floyd's case, 70 Ala. 32, the Court said:

"The taking of an affidavit and the issue of a warrant of arrest, impose duties in their natures judicial. The statute raising the jurisdiction of county courts in Madison County confers no power on the clerk to administer such oaths." Pamph. Acts, 1876-7, p. 149, Code 1876, Sec. 4702."

In this case the affidavit was taken before the clerk (provided for the county court of Madison County) *and the warrant of arrest* was issued by the Judge but as said above the affidavit or complaint may be made only on probable cause, which involves a judicial ascertainment. See also *Higdon v. Stuckey*. 169 Ala. 148.

Respectfully,
J. Q. SMITH,
Attorney General

DEPARTMENTAL EXPENSE; ACCOUNTING:—State Auditor may contract to pay county land agent not more than ten per cent on redemptions of lands bid in by the State at tax sales.

October 8, 1919.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol, City.

Dear Sir:

In your recent communication to the Attorney General's office, you ask:

"Is it legal to pay the county Land Agent employed by the Auditor ten per cent on account of redemptions of real estate sold for taxes and bought by the State, where two years have not expired since date of said sale?"

By the terms of an act (commonly referred to as the Revenue Act) approved September 14, 1915 (Acts 1915, p. 386), Sections 262, 263, 264 provide as follows:

Section 262. "The State Auditor shall appoint, with the approval of the Governor, an agent in each county in the State to look after, protect against trespassers, and rent any real estate bid in by the State at tax sale; said agent shall be under the control and direction of the State Auditor, who shall have the power to remove for any cause, any agent so appointed."

Section 263. "The State Auditor by the approval of the Governor may contract with some person or firm in each county of the State, to investigate sales of real estate for taxes and bid in for the State, to notify parties at interest in such real estate, of such sale, to secure redemption or sale of property subject to sale at private sale by the State."

Section 264. "For services rendered, under the two preceding Sections the Auditor may allow fair compensation, which shall not exceed ten per cent. of the proceeds of such rent, sale or redemption, and shall be paid from the fund so received."

The same provisions of Sections 262, 263, and 264, supra, are carried forward—and in the same language—into the Revenue Act approved September 15, 1919, entitled "An Act to provide for the general revenue of the State of Alabama," and being Sections 311, 312 and 313 of the last mentioned Act (Acts 1919, p. 373).

It will be observed from Section 263 of the 1915 act (312 of the 1919 act) that it is a part of the duties imposed on the county Land Agent to secure redemption of property sold for taxes and bought in by the State, and by Section 264 of the 1915 act (313 of the 1919 act) it is provided that for such services rendered the Auditor may allow fair compensation which shall not exceed 10% of the proceeds of

such rent, sale, or *redemption*, and shall be paid from the funds so received.

"Redemption" of real estate may be had at any time within two years after the tax sale and before the State conveys title to the realty purchased by it under any tax sale.

It would therefore follow that it is within the sound discretion of the State Auditor to fix the amount of compensation for the services rendered, but not to exceed 10% of the amount of the redemption money, as indicated by a reading of the above sections.

It is quite true, as suggested by you, that property may be sold for taxes and the next week thereafter be redeemed, and the county agent receive 10% upon redemption, but this is a matter addressed to the sound business judgment and discretion of the Auditor in making a proper contract safeguarding the rights of the State in paying sums in adequate proportion to the amount of the services to be rendered to the State.

Respectfully,

J. Q. SMITH,
Attorney General.

LEGISLATION; VALIDITY OF ACTS:—Bill approved Sept. 28, 1919, for relief of R. H. Green, is constitutional.

October 9, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol, City.

Dear Sir:

I beg to acknowledge receipt of your letter of October 8, inclosing a copy of Senate Bill 285, which was approved on September 28, 1919 (Acts 1919, p. 739). Said Act makes an appropriation for the relief of Robert H. Green, and you asked to be advised if there is any prohibition either constitutional, or otherwise, against you issuing a warrant in his favor, for said amount.

I am of the opinion, and so advise that the Act is constitutional, and it is your duty as State Auditor, to issue a

warrant to the said Robert H. Green, for the sum of \$856.21, the amount appropriated in said Act.

Very truly yours,

J. Q. SMITH,
Attorney General.

DOG LAW; DEPARTMENTAL EXPENSE; BOARD OF CONTROL AND ECONOMY:—State Tax Commission supervises collection of dog licenses and selects form for tags. Tags are purchased through Board of Control and Economy, and circuit clerks select from supply furnished them the tag applicable for each particular dog.

October 11, 1919.

State Tax Commission,
Capitol, City.

Dear Sirs:

Replying to your inquiry of this date in regard to furnishing of supplies for the enforcement of the Dog Law approved September 30, 1919 (Acts 1919, p. 1077), I beg to advise that the State Tax Commission has general supervision over the collection of the tax or license mentioned in said Act, as well as over taxes and licenses payable to the State. See Section 138 of the General Revenue Act approved September 15, 1919 (Acts 1919, p. 319).

All supplies for all departments and activities of the State are now purchased by the Board of Economy and Control under the Act creating that Board (Section 12), approved February 13, 1919 (Acts 1919, p. 45). Sections 4, 5 and 6 of the 1919 Dog Act provide for the collection of the Tax by the Circuit Clerks and the issuance by them of tags and receipts, furnished by the State, and paid out of its general fund (Section 9 of the 1919 Dog Act). While Section 5 of this Act provides that the size and description of the tags delivered to the owner or keeper of a dog upon the payment of the license or tax shall be selected by the circuit clerk, the Act cannot be made to properly function except by holding that the initial selection and formula for the tags and receipts shall be made by the State Tax Commission under its general supervisory powers.

The purchase of these supplies is made by the State Board of Economy and Control upon the advice of the State

Tax Commission, thus limiting the authority of circuit clerks in the selection of tags to selecting that particular kind of tag which the State, through its general Board shall provide to be used under varying circumstances. To hold that the circuit clerks are authorized to select the size and description of the tags which the State is to purchase would be to make it impossible for the tags to be purchased and paid out of the State's funds, because the Act provides no means by which the circuit clerks could secure the necessary fund with which to meet the expenditure.

I am therefore of the opinion that the Legislature in saying that the size and description of the tags should be selected by the circuit clerks means nothing more than that it is the duty of the circuit clerks to select for the owner or keeper of the dog, in any instance, paying the tax or license, the tag which he is entitled to receive, and that it is the duty of the State Tax Commission to see that the tags and receipts are supplied to the circuit clerks after they have been purchased under their advice by the State Board of Economy and Control.

Very truly yours,
L. E. BROWN,
Assistant Attorney General.

DOG LAW:—State license tax under 1919 law collectible in October, 1919, notwithstanding municipal license tax has been paid in advance.

October 13, 1919.

Dr. A. P. Smith,
Eutaw, Ala.

Dear Dr. Smith:

I am not waiting for your written request for an opinion in regard to the new dog law, as, after looking into the matter, I think I understand your inquiry; that is, is the dog tax provided to be due on October first and delinquent October 15, 1919, under the new law (Acts 1919, p. 1077), collectible where the dog was not subject to State license tax under the 1915 law because of the provision in the old law that "this Act shall not apply to dogs in municipal corporations which impose dog tax of at least one dollar per head on such dogs."

I am of the opinion that the State license tax under the new law is collectible in October 1919, notwithstanding a municipal license tax has been paid in advance. Under the new law, the State license tax is collectible irrespective of municipal license tax.

If any further opinion is desired let us know.

Yours very truly,

J. Q. SMITH,
Attorney General.

COUNTY COURTS; TRIAL TAX:—\$3 trial tax under 1919 revenue law not applicable in misdemeanor cases.

October 13, 1919.

Hon. W. R. Jackson,
Clerk Circuit Court,
Moulton, Alabama.

Dear Sir:

I have your letter of the 10th instant.

Section 4½ of the Revenue Act (Acts 1919, p. 284) to which you refer, reads as follows:

“Section 4½. That a trial tax of three dollars be, and the same hereby is, imposed in each case, civil, criminal, and equity, which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected, to be paid by the clerk of such court, into the general funds of the State treasury.”

It will be noted from this Section that it is provided the tax referred to is imposed in each case “which hereafter goes upon the docket of any *circuit* court in this State.”

In your letter you state that all misdemeanor cases are tried in the County Court and “No misdemeanor is docketed in the Circuit Court.”

Inasmuch as the tax refers only to cases docketed in the Circuit Court and misdemeanor cases are not docketed in the Circuit Court, I do not think the tax applies to misdemeanor cases in your county court.

Yours truly,

J. Q. SMITH,
Attorney General.

CIRCUIT COURT; TRIAL TAX:—\$3 tax under 1919 revenue law accrues upon filing of case, irrespective of termination.

October 13, 1919.

Hon. Rose Huey,
Deputy Clerk of Circuit Court,
Bessemer, Alabama.

Dear Sir:

I beg to acknowledge receipt of your letter of the 2nd, in which you ask to be advised as to whether or not the trial tax provided for in section 41½ of the Revenue Law of 1919 (Acts 1919, p. 284), shall apply to criminal cases where pleas of guilty are entered, or where the solicitor dismisses a case upon the payment of cost, and in civil cases where settlement is made without trial.

By a careful reading of section 41½, you will find that it provides for a \$3.00 tax to be imposed in each case, civil, criminal or equity, which hereafter goes upon the docket of the Circuit Court in this State, to be taxed and collected as other costs, and when collected, to be paid by the clerk of such court into the general funds of the State Treasury.

I am of the opinion, and so advise, that this tax accrues when the case is filed and put upon the docket.

Very truly,
J. Q. SMITH,
Attorney General.

CIRCUIT COURTS:—City Court of Bessemer ceased to exist after January 14, 1917, and law establishing it was superseded by Act of 1915.

October 13, 1919.

Hon. Rose Huey,
Deputy Clerk, Circuit Court,
Bessemer, Alabama.

Dear Sir:

I have your letter of the second instant.

An Act approved August 16, 1915 (Acts 1915, p. 279), Section 3, provides:

“That with the exception of the Probate Court, every court of record having the jurisdiction of the Cir-

cuit Court and Chancery Court, or of either, and every Court of record by whatever name called, having the jurisdiction to try civil and criminal cases, or either, with juries, is hereby consolidated into the Circuit Court."

And Section 8 of the same Act provides:

"That all laws, general, special or local, in conflict with any of the provisions of this Act be and the same are hereby repealed."

A system is provided by the general laws of the State for taxing costs in the Circuit Courts, and I am of the opinion that under the two sections of the Act of 1915 above referred to, the right to collect the county taxes referred to in your letter no longer exists.

The Supreme Court of Alabama in referring to the Law and Equity Court of Monroe County, in the case of *Ex Parte City Bank & Trust Company*, 76 So. 373, held that:

"It must be conceded that the Law and Equity Court of Monroe County *passed out of existence* (Italics ours) at midnight January 14, 1917, and that the regular judge of said court had no jurisdiction over pending cases therein after the consolidation of that court with the Circuit Court. General Act 1915, p. 279."

Following the same line of reasoning leads to the conclusion that the City Court of Bessemer ceased to exist at the same time; that the law by which said court was established was superseded by the Act of 1915 above referred to; that the general system of taxing costs, fees, etc., in the Circuit Court applies, and the provisions to which you refer in the Act creating the Bessemer City Court is no longer effective.

Yours truly,

J. Q. SMITH,
Attorney General.

PUBLIC SERVICE COMMISSION; UTILITY COMPANIES; MUNICIPALITIES:—Act of 1915 broadens powers of Commission, and its exercise of the police power of the State is not interfered with by the contract clause in section 3.

October 13, 1919.

Alabama Public Service Commission,
Capitol, City.

Gentlemen:

The Attorney General's office is in receipt of your communication of the 7th inst., with reference to the jurisdiction of the Commission, reading in part as follows:

"The Commission is desirous of having an opinion from you relative to an Act to change the name of the Railroad Commission of Alabama to the Alabama Public Service Commission, and to enlarge its authority, powers and jurisdiction, known as Senate Bill 803, Acts of 1915, page 865.

"The Commission is desirous of knowing whether or not Section 3 of the Act in question deprives the Commission of its former exclusive jurisdiction over telephone companies and street car companies where contracts existed between such utilities and municipalities, or whether this restriction applies only to such public utilities as were placed under the jurisdiction of this Commission by said Act herein referred to."

In reply I beg to advise:

In and by section one of the act entitled "An act to change the name of the Railroad Commission of Alabama to the Alabama Public Service Commission to enlarge its authority, powers and jurisdiction," approved Sept. 25, 1915, Acts 1915, p. 865 (referred to in your letter), it is provided:

"That the name of the railroad commission of Alabama is hereby changed to the 'Alabama Public Service Commission'; that all of the authority, rights, powers, duties, privileges and jurisdiction of the railroad commission of Alabama are hereby expressly conferred upon the Alabama Public Service Commission as full (sic) as if so named in any laws of this

State ***** all actions and proceedings shall survive and be continued and prosecuted by and in the name of the Alabama public service Commission," &c.

The rights, powers, duties and jurisdiction referred to as possessed by the railroad commission are to be found in chapter 130, Code 1907; Acts 1907, pp. 29, 43, 49, 57, 58, 59, (spec. session); Acts 1909, p. 35 and Acts 1915, p. 567 (commonly known as the Cooper act, approved Sept. 15, 1915.)

Broadly speaking, the Railroad Commission, at the time of the passage of the act of Sept. 25, 1915, had jurisdiction of railroads and their equipment, including bridges, terminals, depots and side tracks, express companies, sleeping car companies, steamboat or steam packet companies, telegraph and telephone companies, and street cars not being operated wholly within one city or town. It will be observed that the terms of the act of Sept. 25, 1915, expressly preserve and confer upon the Public Service Commission *in solido* and without reservation "all of the rights, powers, duties, privileges and jurisdiction" hitherto existing and residing in the Railroad Commission.

Section 3 of said act of Sept. 25, 1915, enlarges the authority, powers, duties and jurisdiction of the Commission and gives it exclusive jurisdiction, supervision and authority to regulate, supervise and control rates and charges and to correct abuses therein and to require persons, firms or corporations to establish and maintain such rates and charges as may be reasonable and just and from time to time to alter or amend the same as said Commission may order or require, such authority embracing and being extended to railroads, street railways, telephone and telegraph companies, electric companies, gas companies, water companies, hydro-electric or water power companies, heating companies, combination gas and electric companies, combination electric and water companies, combination electric and heating companies, combination electric, heating and gas companies, combination electric, heating, gas and water companies (provided that said public utilities are not municipally owned.)

The clause inquired of in your letter with reference to contract is also set out in said section 3 and reads as follows:

"Provided further that nothing herein shall be construed to affect *any valid subsisting contract now in existence*; and provided further that nothing herein shall be construed to affect *any future contract entered into by and between any municipality and such person, firm or corporation.*"

The broad powers and authority to regulate, control and supervise public service corporations and to correct abuses and discriminations in rates and charges is referable to the police power of the State. The police power is inherent in and incident to the sovereignty of every State; it is exercised for the public welfare and convenience in those functions that make for the health, safety, morals, good order, comfort or general welfare of the public. Police powers, in the nature of things, cannot be abdicated without a surrender of sovereignty and hence they may not be bargained away or controlled by contract.

Northern Pac. R. R. Co. v. Minnesota ex rel Duluth, 208 U. S. 583 (52 U. S. L. ed. 630) ;

Manigault v. Springs, 199 U. S. 473 (50 L. ed. 274) ;
Chicago B. & Q. R. Co. v. State of Nebraska, ex rel Omaha 170 U. S. 57 (42 U. S. L. ed 948) ;

Wabash R. R. Co. v. City of Defiance, 167 U. S. 88, (42 U. S. L. ed. 87) ;

City Council of Montgomery v. Cap. City Water Co. 92 Ala. 361.

In the Northern Pacific case, *supra*, (p. 596) the U. S. Supreme Court said:

"There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. In *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. ed 269, 272, 14 Sup. Ct. Rep. 437, 440, the

doctrine was thus laid down by Chief Justice Fuller, speaking for the court:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24, L. ed. 989; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29, L. ed. 516, 6 Sup. Ct. Rep. 252; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247; 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.'"

* * * * *

"The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution."

In *Manigault's case*, *supra*, the U. S. Supreme Court remarked:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This pow-

er, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good."

Citation of authority along this line might be multiplied at considerable length but the above authorities will suffice to give direction and authority to the point under consideration.

Since the Alabama Public Service Commission is an arm of the State vested with the powers hereinabove referred to, it would follow that it could not be deprived of its regulatory power of supervision because some municipality and a public service corporation might have entered into contractual relations on the matter before the Commission. And so in the Chicago B. & Q. case, *supra*, we find the pertinent observation (p. 74):

"However this may be, we think that in view of the paramount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control, and change such agreements as may be, from time to time, entered into between the city and the railroad company, in respect to such crossing, saving any rights previously vested. Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature.

"This subject has been so often considered by this court that it seems needless to here enlarge upon it.

It is sufficient to cite a few of the cases. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25 (24 L. ed. 989); *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659 (24 L. ed. 1036); *New Orleans Gaslight Co. v. Louisiana Light Co.* 115 U. S. 650 (29 L. ed. 516); *Mugler v. Kansas*, 123 U. S. 623 (31 L. ed. 205)."

In the *Wabash* case, *supra*, (p. 100) the United States Supreme Court speaking of the police power which inheres in municipal corporations (save as it may be expressly altered by statute as was the case in conferring the powers upon your Commission) says:

"The general rule to be extracted from the authorities is that the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions. These bodies exercise only such powers as are delegated to them by the sovereign legislative body of the state. Such powers, however, are personal to the municipalities themselves, and, being conferred for the benefit of the whole people, in the absence of authority to that effect, cannot be bestowed by contract or otherwise upon individuals or corporations in such manner as to be beyond revocation. Whatever construction be given to the ordinance of December 20, 1887, it cannot be held to stand in the way of a power to make such changes as the growth of population may seem to require."

In the case of *Mississippi Railroad Commission v. Mobile & Ohio R. R. Co.* 244, U. S. 388 (61 U. S. L. ed 1216) the U. S. Supreme Court said:

"A state may regulate the conduct of railways within its borders, either directly or through a body charged with the duty and invested with powers requisite to accomplish such regulation. *Miss R. Com. v. Illinois*, C. R. Co. 203 U. S. 335 (51 L. ed. 209); *Prentiss v. Atl. Coast Line R. Co.* 211 U. S. 210 (53 L. ed. 150); *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298 (58 L. ed. 229) * * * But while the scope of this power of regulation over carriers is very great and comprehensive, the property which is invested in the railways

of the country is nevertheless under the protection of the fundamental guaranties of the Constitution and is entitled to as full protection of the law *as any other private property* devoted to the public use and it cannot be taken from its owners without just compensation or without due process of law. Wisconsin M. & P. R. Co. v. Jacobson 179 U. S. 287 (45 L. ed. 194); Atlantic Coast Line R. Co. v. N. Cor. Corp. Com. 206 U. S. 1 (51 L. ed. 933); N. Pac. R. Co. v. N. Dak. 236 U. S. 585 (59 L. ed. 735); Chicago M. & St. P. R. Co. v. Wisconsin 238 U. S. 491 (59 L. ed. 1423). This power of regulation if it is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service passes beyond lawful bounds and is void because repugnant to the due process of law provision of the 14th amendment to the Constitution of the United States. Atlantic Coast Line R. Co. v. N. Car. Corp. Com., *supra*; Missouri P. R. Co. v. Tucker 230 U. S. 340 (57 L. ed. 1507) N. P. R. Co. v. N. Dak. 236 U. S. 585 (59 L. ed. 735)."

In a recent case before the U. S. Supreme Court decided January 7, 1919, U. S. Sup. Ct. advance sheet (Lawyers Co-op. Co.) Feb. 1, 1919, p. 116, where the court had under consideration a ruling of the State Railroad Commission of Georgia wherein that Commission had allowed the Ga. Public Service Corp. (of Macon, Ga.) to charge a certain rate which was in excess of an existing contract rate between the said Ga. Pub. Serv. Corporation and the plaintiff in error (the Union Dry Goods Co. of Macon), the court said:

"Thus it will be seen that the case of the plaintiff in error is narrowed to the claim that reasonable rates, fixed by a state in an appropriate exercise of its police power are invalid for the reason that, if given effect they will supersede the rates designated in the private contract between the parties to the suit, entered into prior to the making of the order by the railroad commission. Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion. That private contract rights must yield to the public wel-

fare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. Thus in *Manigault v. Springs* 199 U. S. 473, 480 (50 L. ed. 274, 278) it was declared that:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from (properly) exercising such powers for the general good of the public though contracts previously entered into between individuals may thereby be affected. This on authority of many cases which are cited."

"In *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 357, 52 L. ed. 828, 832, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560, it is said that:

"One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."

"In *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 482, 55 L. ed. 297, 303, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265, this is quoted with approval from *Legal Tender Cases*, 12 Wall 457, 550, 551, 20 L. ed. 287, 311, 312, viz:

"Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."

"In *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 567, 55 L. ed. 338, 31 Sup. Ct. Rep. 259, it is said:

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safe-guards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

"In *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. Rep. 364, the court said:

"It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.'

"And in *Rail & River Coal Co. v. Ohio Industrial Commission*, 236 U. S. 338, 349, 59 L. ed. 607, 615, 35 Sup. Ct. Rep. 359, the state of the law upon the subject is thus aptly described:

"This court has so often affirmed the right of the state in the exercise of its police power to place reasonable restraints, like that here involved, upon the freedom of contract, that we need only refer to some of the cases in passing.'

"These decisions, a few from many to like effect, should suffice to satisfy the most-skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state, and the judgment of the Supreme Court of Georgia must be affirmed."

It will therefore be deduced from the foregoing authorities that the police power of the state or its arm—the Commission, duly thereunto vested with appropriate power—may regulate, supervise and control rates and establish and declare what, under the circumstances of each case, are the fair and reasonable rates or charges that may be exacted. This power must be exercised in a reasonable and not arbitrary or capricious manner. From this the corollary follows that any unreasonable and arbitrary ruling that would compel a public service under such terms and circumstances that a fair and reasonable yield or interest may not be had upon the investment devoted to the public service would to the extent of the loss sustained practically amount to confiscation and therefore infringe the due process clause of the Federal Constitution.

The question then arises what effect and interpretation should be given the provisos in said section 3 of the act of Sept. 25, 1915, reading:

"That nothing herein shall be construed to affect any valid subsisting contract now in existence; and provided further that nothing herein shall be construed to affect any future contract entered into by and between any municipality and such person, firm or corporation."

It must be noted that the act of Sept. 25, 1915, not only in express terms preserved and continued the powers and authority of the Railroad Commission but enlarged upon them conferring other powers in addition; it could not, therefore, be said that it was the intent of the framers of the act to curtail or restrict the jurisdiction of the Commission by the insertion of this clause. Nor could any paramount constitutional guaranty or right be strengthened or affected by the statute. The protection accorded by the Constitution must needs be derived from recourse to that instrument and not the statute.

If the Alabama Public Service Commission had the same powers as the Railroad Commission, certain it is that the powers and authority of the latter were not affected or restricted by any similar "contract" clause as to those utilities under its jurisdiction, nor could it be said that in view of the announced purpose of the title of the act and the act itself to "enlarge" and superadd powers that the "contract" clause should be interpreted as applicable to only the new or superadded utilities for then the so-called "enlargement" would be so only in name for all that the new utilities would have to do to tie completely the hands of the Commission, in future, would be to make such contract as might suit their pleasure or purpose.

Having regard then to the state of the law at the time of the enactment, interpreted in the light of the foregoing authorities, the Commission would have regulatory supervision and control over public utilities under its jurisdiction irrespective of whether there was or was not a contract extant or outstanding subject always to the restriction pointed out above against arbitrary, confiscatory acts of the Commission.

I am therefore of the opinion that the Commission would have the same authority under the police power of the state whether the said "contract" clause should be stricken out or

left in the Act, in other words, the police power remains unaffected.

Of course the Legislature might create a Commission with broad or narrow powers, as it might see fit to impose, but as said above these "contract" clauses are not words of limitation or restriction upon its authority as the whole act negatives that idea.

It would appear that the Legislature inserted these contract provisions as saving clauses out of abundance of precaution, thinking thereby to safeguard against the inhibition against impairing the obligations of contracts. But as we have seen such a provision is inapposite as applied to police regulations, when that power is properly (i. e., reasonably as contradistinguished from arbitrarily) exercised. If the act of the Commission be confiscatory it would not be the contract clause of the Constitution that would protect but the taking of property without just compensation or due process of law, aside from any question of contract.

Outside of the domain of "reasonable police regulation," contract rights would remain inviolate and this is the restricted sphere of influence or application that would be exerted by the said "contract" provisions of Section 3 of said Act of September 25, 1915.

In conclusion I might say that I am not unmindful of the fact that there is a line of cases referred to in *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, and *Vicksburg v. Vicksburg Water Works Co.* 216 U. S. 496, *Detroit v. Detroit Citizens St. Ry. Co.* 184 U. S. 368, and *Milwaukee Ry. v. Wisconsin R. R. Com.* 238 U. S. 174, to the effect that when express and unmistakable authority is conferred upon municipal corporations to fix rates and contract for public utilities, a municipal corporation may when granting franchises covering a period of years contract for a maximum rate for water or other service to the public and that such rate fixed by contract will be protected under the contract clause of the Federal Constitution.

As said in *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558 (570), the fixation of a minimum figure, by contract, below which the city may not go is not granting away the power of regulation but rather a limitation thereon; the power to regulate being conceded to be a legislative or governmental function.

Since the principle is unquestioned that the police power (an inherent and indispensable attribute of sovereignty) may not be abdicated or bargained away, it would appear that the true rationale or principle on which the cases between municipal corporations and public utilities proceed is not (as loosely termed in some instances) an indication on the part of the State to *pro hac vice* renounce its right through municipalities clothed with power, but rather that in suits *inter partes* involving, as said in the Vicksburg Case, supra (p. 508), "*proprietary*" rights the city will be estopped from repudiating its contract creating vested property rights. The power of the State, however, to regulate is not abdicated.

It is my opinion, as said above, that the Commission would have the same jurisdiction and powers were the contract clause left in or stricken out of the Act.

Respectfully,

J. Q. SMITH,
Attorney General.

CIRCUIT COURTS; TRIAL TAX; COST BILLS:—\$3 trial tax under 1919 revenue law cannot be paid from convict fund.

October 15, 1919.

Hon. C. B. Rogers,

President, Board of Convict Inspectors,
Montgomery, Alabama.

Dear Sir:

I have your letter of the 14th inst., stating that you have an inquiry from the Clerk of the Circuit Court at Dadeville as to whether the trial tax of \$3.00, referred to in Section 41½ of the Revenue Law (Acts 1919, p. 284), should be included in the cost bills sent to your department in penitentiary cases, and requesting me to advise whether this tax is a proper charge.

Your department is only authorized to make the payments referred to in Section 6572 of the Code, and I am of the opinion that there is no authority for you to make any payments on account of the \$3.00 tax referred to in Section 41½ of the Revenue Bill.

The purpose of Section 6572 of the Code was to provide for the payment of costs and fees to officers therein named

when suit costs and fees could not be collected otherwise; and there is no reason for the Convict Department to pay out this \$3.00 tax from State funds to be placed in the State treasury for the use of the State, as such a course would merely remove a State fund from one office to another.

However, as stated above, I am of the opinion that your authority is limited to Section 6572 of the Code and it makes no provision for the payment of this \$3.00 tax in penitentiary cases.

Yours very truly,
J. Q. SMITH,
Attorney General.

ROADS; HIGHWAY DEPARTMENT:—State Highway Commission cannot legally approve contract, bids for which were advertised for under the 1911 law, after that law was repealed by the 1919 law, but must re-advertise.

October 16, 1919.

Mr. W. S. Keller,
State Highway Engineer,
Montgomery, Alabama.

Dear Sir:

I have your letter of the 16th inst., with reference to advertising for and receiving bids and making contracts for the construction of public roads under the 1911 State Highway Law and the State Highway Law of 1919.

It appears from your letter that bids were advertised for under the 1911 law, during the month of September and that the 1911 law was repealed and the 1919 law became effective October 1st, but that the bids were not to be opened until October 18th, after which contract is to be made.

The 1911 law provides that the county authorities shall receive bids and let the contract, while the new law provides that the State Highway Engineer shall advertise for and receive bids and let the contracts.

It will be noted that the system of advertising for and receiving bids and letting contracts is entirely different under the two statutes. Section 22 of the new law (Acts 1919, p. 898) repeals the former law, and Section 26 of the new law provides that,

"All laws or parts of laws, local or general, inconsistent or in conflict with the provisions of this Act are hereby repealed."

Inasmuch as the method of advertising for and receiving bids and letting contracts under the 1911 law is altogether different from the method provided for in the 1919 law, the provisions with respect to these points in the 1911 law are inconsistent and in conflict with the provisions of the 1919 law.

Moreover, the 1919 law provides that the contracts shall be made in the name of the State of Alabama which was not the plan called for by the 1911 law.

For the reasons hereinabove stated, I am of the opinion that the State Highway Commission cannot now legally approve the awarding of a contract by a county, bids for which were inserted prior to the repealing of the old law, and that it will be necessary to re-advertise for bids under the new Act and the contract awarded and executed in the name of the State of Alabama.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

DOG LAW:—Local law for Dallas County is repealed by general dog law.

October 17, 1919.

State Tax Commission,
Capitol.

Dear Sirs:

Referring to the inquiry submitted to this office whether the act passed at the recent session of the Legislature, known as the Dog Law (Acts 1919, p. 1077), repealed the local law on that subject for Dallas County, I beg to advise that the local law is repealed in so far as it is in conflict with the more recent State law.

There is no merit in the point raised by Mr. Barker, Circuit Clerk of Dallas County, in his letter to you of October 14, that you cannot repeal a local act unless the repealing act is advertised as is required for a local act. To repeal

a local act with a local act this is necessary, but it is not necessary when the repealing act is a general act, as is the new Dog Law.

Yours truly,
J. Q. SMITH,
Attorney General.

ACCOUNTING; GAME AND FISH PROTECTION FUND:—Unexpended balance of a specific fund does not revert to the State treasury under section 55 of 1919 general appropriation act.

October 18, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

In reply to your inquiry of October 15, I beg to advise that I am of the opinion that the Game and Fish Protection Fund remains undisturbed by the provision of Section 55 of the General Appropriation Act of the 1919 Legislature (Acts 1919, p. 994), that all unexpended balances at the end of each fiscal year shall revert to the State Treasury. This provision refers to unexpended balances of specific appropriations and not to funds created as is the Game and Fish Protection Fund.

Yours truly,
J. Q. SMITH,
Attorney General.

LICENSES; PHOTOGRAPHERS:—Traveling photographers pay five dollars for license in each county. Photographers with fixed location pay according to size of town.

October 20, 1919.

Hon. A. A. Evans,
State Tax Commission,
Montgomery, Alabama.

Dear Sir:

I have your letter of the 16th inst., requesting a ruling as to the legislative intent or meaning of the first clause of

Schedule 79 of the recent license Act (Acts 1919, p. 425), which reads as follows: "For each photograph gallery or person, firm or corporation engaged in photography, whether the business is conducted at a fixed location, * * "

You ask if the license would apply to persons engaged in photography who have no fixed location, and if it should be construed as if the words "or not" were inadvertently omitted.

According to my interpretation of this Schedule two general classes of photographers are affected by its provisions; i. e. the "transient or traveling photographer who is taxed \$5.00 *in each county* in which he does business," the other general class including all photographers who do not go beyond the bounds of one county, as to which there is a sliding scale of charges, ranging from \$10.00 for cities or towns of 1,000 to 7,000 people, to \$75.00 for cities of 75,000 inhabitants or more; and for every person operating throughout a county outside of towns and cities of over 1,000 people there is a charge of \$5.00.

The scale of license referred to, in my opinion reaches every photographer regardless of "whether the business is conducted at a fixed location." It seems to me that the expression "whether the business is conducted at a fixed location" is mere surplusage, and that the schedule may be better understood by reading it as if that clause did not appear therein.

I am of the opinion that it was the intention of the Legislature to say "whether or not," etc., "Each—person—engaged in photography" in a county includes those operating at a fixed location as well as those who do not confine their operations to a certain locality, so it seems to me the expression "whether" etc., is surplusage and means nothing.

The clause is to be interpreted as if the Legislature had used the expression "whether or not" etc., for the expressions "whether" and "whether or not" have been held to be synonymous:

"An order of the commissioners' court for local option election is not objectionable because submitting the question 'whether or not' local option shall be adopted, though the language of the law is 'whether' it shall be adopted." *Thurmond v. State*, 79 S. W. 316, 317, 46 Tex. Cr. R. 162.

"An order submitting to popular vote the issue as to 'whether' the sale of intoxicating liquors should be prohibited was not objectionable in failing to use the words 'whether or not'." *Wade v. State*, 109 S. W. 191, 53 Tex. Cr. R. 184.

As to persons operating in more than one point in a single county, I think he is subject to a charge of \$5.00 for doing business throughout the entire county so long as he does not operate in cities or towns of more than 1,000 inhabitants, and if he should operate in a city or town of over 1,000 people he is subject to the tax set out in the sliding scale for each such city or town, for it is provided that "the payment of the license required by this schedule shall authorize the doing of business *only in the town, city or county where paid.*"

The sentence as to transient photographers reading "For each transient or traveling photographer, \$5.00 in each county in which he does business," appears last in the schedule, but I am of the opinion that all which precedes applies to it, and that if such traveling photographer operates in cities or towns of over 1,000 inhabitants he is also subject to tax under the sliding scale; for if not, he could do business in the large cities of the State, by paying the county \$5.00, while those permanently located in any of such cities must pay the full license for the privilege of doing business at only one point. I can see no reason for the Legislature having added a special clause about transients for the law expressly previously states that the tax when paid only applies to the town, city or county in which it is so paid.

I have gone beyond the scope of your inquiry for the reason that in analyzing this schedule, it has occurred to me that it is susceptible of several constructions, and I thought the additional suggestions herein contained might be of assistance to you.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

BUDGET COMMISSION; OFFICE HOLDERS:—Members of Budget Commission except the chairman are entitled to receive compensation fixed by Legislature.

October 21, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

You have called my attention to an act approved February 11, 1919 (Acts 1919, p. 33), to better secure the administration of the financial affairs of the State in respect to expenditures and appropriations; and for that purpose to establish a State Budget Commission, and prescribe rules and regulations governing the same, as amended by an Act approved September 29, 1919 (Acts 1919, p. 878), which provides that members of the Commission except the Chairman shall each be allowed \$100.00 per month for services rendered as members of the Commission. Under the original Act the members of the Commission other than the Chairman are the Attorney General and State Auditor, and you desire to know whether there is any legal reason why the present Attorney General and Auditor should not be paid the compensation allowed members of the Commission by the Legislature.

The salaries of both the Attorney General and the Auditor are protected against increase and decrease during the term for which they are elected or appointed, as is the salary of other offices of profit under the State by Section 281 of the Constitution. Both offices are what are known as constitutional offices. Certain duties the constitution specifically requires these officers to perform and they are also required by the constitution to perform such other duties as are prescribed by law. However, I am of the opinion that the Legislature has not an unlimited discretion in respect to the nature of the duties which it may require to be performed by these officers. If there were no limitation upon the power of the Legislature in respect to the nature of the duties which it may impose upon these officers, it could, for instance, require the Attorney General to act as warden of the penitentiary, as superintendent of the State lunatic asylum, and as superintendent of the State Board of Health; or it might even require that he keep the Capitol lawn well mowed.

The power of the Legislature being conceded to be unlimited in this respect, there would remain only the question of discretion as to the mode of its exercise. While the Constitution contains no express limitation on the power of the Legislature in this particular the definition of the office makes an implied limitation. All the States in the Union have Attorneys General; in fact, it is an office inherited from England, and the general nature of the duties pertaining to that office were well known to the framers of our Constitution. While the general nature of the duties pertaining to the office of Auditor are not so well established as are those pertaining to the office of Attorney General, an office under that name doubtless exists in every State in the Union, as well as in many corporate organizations, and the nature of the duties of the office are generally well known.

When the Constitution provided for an Attorney General it intended thereby to guarantee the existence of such an officer charged with the performance of such duties as an Attorney General is accustomed to perform; and it was never intended that the Legislature should or would have the power to require that such a duly elected constitutional officer perform such duties, for instance, as that of Superintendent of the State Lunatic Asylum.

In providing that the Attorney General perform such duties as might be required by law, it may be granted that the Legislature was to exercise a wise discretion in the duties to be imposed on this officer. It was doubtless intended that the Legislature might assign to the Attorney General, and to the Auditor, any duties which by a liberal interpretation should come within the general scope of that class of duties which usually appertain to such officers as they were understood by the framers of the Constitution. The title to the Budget Commission Act indicates the purposes for which the Commission was instituted, i. e., "To better secure the administration of the financial affairs of the State in respect to expenditures and appropriations."

The duties imposed on the members of the Commission are not such as to require the professional learning of a lawyer. In fact, they are wholly foreign to the duties of an Attorney General and are not more cognate to them than the management of a State prison or lunatic asylum.

The legislature has no more power to compel the Attorney General to perform such services as a part of the duties of his office than it has to require him to take charge of the State prison or to require the Governor to become Secretary to the Railroad Commission.

I am therefore of the opinion that the Attorney General is under no obligation to perform the services required of him as a member of the Budget Commission and he may decline to perform them without any breach of his official duties as Attorney General. If, however, he voluntarily performs them, he does not thereby enlarge the scope of his official duties as a constitutional officer. As said by the Supreme Court of California in the case of *Love, Attorney General v. Baehner, Treasurer*, 47 Cal. 364, "By no compact between him and the Legislature can his official duties as Attorney General be extended beyond the limits contemplated by the Constitution."

If, however, the Attorney General performs the service which under the Constitution is wholly foreign to his office, and which is not and cannot become a part of his official duties as Attorney General, and if the Legislature has seen fit to compensate him for his unofficial service, I do not think that there is any constitutional impediment to hinder him receiving the compensation.

What has been said as to the Attorney General applies likewise to the Auditor. While there may be some less, there is still ample justification for holding that the duties imposed on the Auditor as a member of the Budget Commission extend beyond the limitations of the official duties of Auditor as contemplated by the Constitution.

It lies within the power of the Legislature to abuse its trust and evade the constitutional prohibition by providing exorbitant compensation for trivial non-official services, but the important duties entailed upon the Budget Commission can acquit them of criticism in this instance.

I therefore advise that in my opinion there is no reason why the compensation in question should not be paid these officers.

Yours truly,
L. E. BROWN,
Assistant Attorney General.

CIRCUIT JUDGES; APPROPRIATIONS:—Act fixing salaries carries sufficient appropriation to pay salaries higher than provided for in general appropriation bill.

October 21, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol, City.

Dear Sir:

In reply to your inquiry of October 20, asking if the act approved September 29, 1919 (Acts 1919, p. 691), fixing the salaries of the several circuit judges at \$4,000.00 per annum, carries with it sufficient authority for you to pay those officers on this basis, notwithstanding the amount carried in the general appropriation bill is only \$3,600.00 per annum. I am of the opinion that the act fixing the salaries at \$4,000.00, carries with it, in Section 2, a sufficient appropriation for the payment of salaries of \$4,00.00.

Yours truly,

J. Q. SMITH,
Attorney General.

SURETY BONDS; DEPARTMENTAL EXPENSE:—Premiums on guaranty bonds of state officials may be paid from the State treasury.

October 23, 1919.

Hon. Ira Champion,
Recording Secretary,
Capitol, City.

Dear Sir:

This office is in receipt of your letter of this date wherein you say the Governor directs you to ascertain whether the bill of Porter-Jennings Company, Inc., for premiums on bonds of the Commissioner of Agriculture and his clerks amounting to \$39.00, as per bill attached, should be paid out of the General Fund in the Treasurer's office, I beg to advise:

Section 15 of an act entitled

“An Act to provide for and require guarantee or surety bonds of State officials and their assistants, clerks and employees; to fix the amount or amounts of

said bonds and to provide for the premiums of said bonds; and to provide for the approval and filing of said bonds," (Approved Feb. 20th, 1915, Acts '15, p. 115),

provides that the premiums upon bonds required of public officials "shall be paid by the State of Alabama out of the funds in the State Treasury" upon approval by the Governor. This means, in my opinion, that such sums shall be paid out of the General Fund. The bill transmitted with your letter is herewith returned.

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

ROADS; COUNTY WARRANTS; DEPOSITORIES:—Local act fixes maximum compensation of road foremen in Russell County. County warrants do not carry interest unless so stated. Depository is not a county officer. Depository must keep special road fund separate from general fund. A county after reaching the constitutional debt limit may not borrow money though it may appropriate the tax levy. County may not raise feed for mules used on road work.

October 25, 1919.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol, City.

Dear Sir:

Your communication of the 13th inst. to the Attorney General's office has been received.

I beg to advise as follows:

Section 3 of "An act to provide for the establishment, discontinuance, construction, use, working, and maintenance of the public roads," etc., approved September 22, 1915, (Acts 1915, p. 573, et seq.) reads:

"Section 3. That this Act shall not be construed to repeal either in part or in whole any existing local or special law."

The Local Laws 1903, p. 255—being "An act to provide for the construction, repairing, working and maintaining

of the public roads of Russell County," etc., approved September 22, 1915.

Section 3 of said Local Act of September 26, 1903, reads:

"Section 3. That said road foremen shall receive a salary for their services, not to exceed five hundred dollars, to be determined by the Court of County Commissioners," etc.

I am therefore of the opinion that the Local Act fixes the maximum compensation allowable for the service that may be paid the road foreman of Russell County.

Your second question is, "Has the Commissioners Court authority to pay interest on an ordinary county warrant which is unpaid because of insufficient funds in the treasury and which was not drawn as an interest-bearing warrant?"

It is within the competency of the County Commissioners to contract (in subjects within their jurisdiction) for interest-bearing warrants (Board of Revenue Shelby County v. Farson, 197 Ala. 375) but where no such contract is made and county warrants are issued without interest they bear none.

Vincent v. Gilmer's Executor, 51 Ala. 387;

Caldwell v. Duncan, 65 Ala. 461 (465);

Town of Eutaw v. Coleman, 189 Ala. 164 (178).

They are unlike warrants of municipalities in this respect, since there is a statute in the case of the municipalities that starts interest running from default (Code 1907, Sec. 1205).

Your third question reads: "Is the county depository an officer of the county within the meaning of Section 7430 of the Code of 1907?"

A banking institution under Acts, 1915, p. 348 (abolishing county treasurers and providing for the deposit of county funds in certain banks, etc.) is not an officer but a contractee. See Compton v. Marengo Co. Bank, 82 So. 159. I therefore answer your question in the negative.

Your fourth question, in substance, asks: "If the depository keeps the books required of the treasurer, keeping the accounts of the various funds separate thereon but on the ledger of the depository the general and the special road

fund (derived from special road tax and money borrowed for road purposes) are commingled and in consequence the county Depository pays out of the special road fund items properly belonging to the general fund, is the said Depository liable?"

Section 5 of the Act abolishing the office of County treasurer, etc., (Acts 1915, p. 348), provides that:

"The bank or banks so designated as depositories for county funds shall be charged with all the duties and subject to the same liabilities in so far as the safe-keeping and paying out of the funds of the several counties are concerned as are now imposed by law upon County Treasurers," etc.

Section 215 (a) Constitution provides that road taxes shall be applied exclusively for the purposes for which levied and collected. Code Section 2208 requires the county treasurer to keep special taxes separate and distinct from other funds and to keep a separate account thereof.

Code Section 211 (3) provides further duties of the county treasurer with reference to keeping accounts of general and special funds (See also *Kayser v. Bird*, 74 So. 49).

Code Section 5838 as amended by Acts 1915, p. 375, also provides that the commutation fee in lieu of labor on roads shall be kept as a special fund, etc.

I am, therefore of the opinion that if the general fund and special road fund are commingled and drafts or encroachments are made upon the special fund that properly belong to the general fund that the county depository breaches its duty and since statutes are read into and become a part of the bonds required by statute to be given (*U. S. Fidelity Co. v. Union Trust Co.*, 142 Ala. 532) the State (on behalf of the county) might maintain an action upon the bond for any loss sustained (Code Sections 2440 and 2443). See *Bradford v. State* 77 So. 696.

Upon a suit, however upon the bond of the Depository, I am of the opinion that it could show that no loss was actually sustained but an error in bookkeeping and since the duty is imposed by law to keep correct books, I see no reason why if an item or items are incorrectly credited to the wrong account the depository might not *mero motu* correct the error in bookkeeping. If the warrant was

drawn on the road fund and paid out of the general fund this would be such error as could be corrected or vice versa.

But if the warrant was drawn on the general fund with the intention of thereby appropriating such money to the uses and purposes of the road fund the money thereby appropriated becomes a special road fund and cannot be diverted from such purpose; it follows that special funds must be appropriated only to the special purpose of the fund, but general funds may at the discretion of the County Commissioners be converted into the special fund, if they so direct. This answers your fifth question.

In reply to your sixth question, which is also repeated in your letter of October 15, 1919, I beg to advise:

When a county has reached its constitutional limit under Section 224 of the Constitution it may not then contract any further debt; it is then reduced to a "cash basis" and a policy of "pay as you go." In order, however, that it may function as an arm of government the law says that while it must live within its revenue for the current tax year, yet it may appropriate its tax revenues in anticipation—for this purpose the tax levy is by a fiction considered as funds in esse or on hand. An "appropriation" or *parceling out* of funds is not the equivalent of a contract or creating an indebtedness; for (as said in *Brown, Treas. v. Gay-Padgett Hdw. Co.*, 188 Ala. 427) the indebtedness interdicted "is the obligation to pay more money than can be supplied by current funds or by current revenues provided by lawful taxation for the fiscal year." In arriving at what is meant by living within the income of the current fiscal year, recourse should be had first to all those debts or obligations made obligatory upon a county, of an involuntary class, such as heating the jail (Code Section 140) and those claims by Code Section 153 made preferred claims. After all claims that are made obligatory upon a county are computed—or subtracted—the balance, if any, is the amount that the County Commissioners are invested with discretion as to what purposes it will "appropriate" or set apart its revenue for during the current fiscal year.

Any amount of appropriations out of the current annual revenue that exceed the revenue are "debts" or undertakings to pay and are not "appropriations" of funds *in hand* and to this extent all such obligations or undertakings are absolutely void—in face of the Constitution. This being

true, I answer your question by saying that a county having reached the constitutional limit may not "borrow money" at all under either of the acts cited in your letter (to-wit Local Acts 1907, p. 584 or Acts 1915, page 105).

In this aspect of the case I do not pass upon the effect of the latter act upon the former, as neither would have any effect upon a county already up to the constitutional limit. As said in *Brown, Treas. v. Gay-Padgett Hdw. Co.*, 188 Ala. 431. "We think it is clear also that such county cannot *borrow money* even to provide funds for current and necessary municipal expenses."

In answer to the question in your letter of the 21 inst., asking if the act approved September 22, 1915, (Acts 1915, p. 573) 'authorizes the county commissioners "to engage in farming operations for the purpose of producing feed for mules used in road work" I reply in the negative. I do not think the act is susceptible of any such elastic construction or that such power is implied as a necessary incident to road building. The county should buy its feed in the market. By the same token the Commissioners might go into the mercantile business and run a commissary for the benefit and convenience of the persons engaged in road work.

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

HEALTH DEPARTMENT:—County health boards have full authority to abate nuisances within municipalities.

Dr. S. W. Welch,
State Health Officer,
Montgomery, Ala.

Dear Sir :

Referring to your letter of the 19th inst., to which is attached a letter from Mr. A. M. Waldrop, County Health Officer and Field Agent, to you, dated October 14, 1919, I herewith return to you as requested, "Medical Laws 1916" and House Bill No. 583 of the Legislature of 1919.

As I understand your inquiry, you desire to know just what authority you and your assistants have with reference to the regulation of privies in incorporated towns.

Section 718 of the Code of Alabama, as amended by the act of 1919 (Acts 1919, p. 941)—see pamphlet act which you delivered to me, pp. 41, 42 and 43—provides:

“Subdivision 1. The following things, conditions and acts, among others, are hereby declared to be public nuisances *per se*, menacing public health and unlawful:

(2) Insanitary * * * privies * * * which are or are likely to become menaces to public health.”

“Subdivision 2. Insanitary buildings, yards, premises, places, privies, ponds, marshes, swamps and dumps which are or are likely to become menaces to public health.”

Subdivision 3 provides that:

“When such nuisance * * * consists of a privy of an insanitary or improper type, the county board of health shall, if after a careful investigation of the facts, it considers such a course necessary for the protection of the public health, adjudicate such * * * privy * * * to be such nuisance and order its summary destruction, without compensation to the owner thereof, and thereupon the county health officer shall proceed with such destruction in such manner as reasonably to avoid danger of infection.”

It will be noted that an insanitary privy is declared to be a nuisance *per se*, and subdivisions 2 and 3 provide for abatement of such nuisance by bill in equity and that the county board may “if after a careful investigation of the facts it considers such a course necessary for the protection of the public health, adjudicate such * * * privy * * * to be such nuisance and order its summary destruction,” etc.

The authority hereinabove referred to seems to be as full as could be desired, provided the *county* board of health is given by the provisions of this act, jurisdiction to act within the limits of an incorporated city or town. Such authority and jurisdiction are vested in the county board of health by Section 700 of the Code, as amended by act of 1919, p. 2 which provides that,

"The boards of censors of county medical societies, shall be known as county boards of health of their respective counties, *including all incorporated municipalities therein,*" etc.

Section 701 of the Code as amended by the Act of 1919, p. 2 provides that,

"No local board of health or other executive body for the exercise of public health functions, other than the county board of health, shall be established or exist in any county or municipality, nor shall any municipality have a municipal health officer or other like officer."

While the authority above referred to is, in my opinion, entirely sufficient for your purposes I refer you also to Section 703 of the Code as amended by Act of 1919 (Acts 1919, p. 911). It will be noted that this section authorizes county health boards to promulgate rules and regulations, such as they may deem necessary, and that county health officers are given jurisdiction over incorporated towns and cities.

I therefore conclude by expressing the opinion that you have ample authority for the abatement of insanitary privies in municipalities, as nuisances.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

OFFICE HOLDERS; SCHOOL SYSTEM:—If county tax adjuster was elected a member of the county school board prior to approval of educational act of 1919, he cannot collect per diem allowed by that law, and is therefore not occupying two offices of profit at the same time.

October 27, 1919.

Mr. J. A. Arnold,
Goodwater, Ala.

Dear Sir:

I have your letter of the 25th inst., asking if you can hold the office of County Tax Adjuster and at the same time

be a member of the county school board, or whether you will have to resign as a member of the county school board.

Section 280 of the Constitution of Alabama provides that no person shall hold two offices *of profit* at one and the same time under this state, and section 281 provides that the compensation of no county officer shall be increased or diminished *during the term for which he shall have been elected*.

Under the new educational code (Acts 1919, p. 583) members of county boards of education are allowed \$5.00 per day and expenses for not exceeding twelve days during each year, while under the old educational code no expenses were allowed to such members.

I assume that you were elected prior to the approval of the new educational code. If so, in my opinion, you are not entitled to collect the \$5.00 per day and expenses above referred to during your present term, for to do so would violate the provisions of section 281 of the constitution.

Since you are not entitled to receive any compensation as a member of the school board, it is not an office of profit and to hold it and the office of Tax Adjuster would not be holding two offices *of profit*.

You will not be eligible for re-election as a member of the school board for you would be entitled to collect for a *new term* the \$5.00 per day and expenses, and it would then be an office of profit and to hold it and the office of Tax Adjuster would be holding two offices of profit at the same time in violation of section 280 of the constitution.

Yours truly,

J. Q. SMITH,
Attorney General.

DOG LAW:—Clerks are entitled to 25 cents for each license, to be paid by owner of dog.

October 27, 1919.

Hon. J. J. Marion,
Clerk Circuit Court,
Linden, Ala.

Dear Sir:

I beg to acknowledge receipt of your letter of October 25 asking as to whether or not you should collect a 25c fee for

dog license. In answer thereto I beg to cite you to Section 9 of the Act which is as follows:

"Section 9. That anything required to be furnished by the circuit clerk for the carrying out of the provisions of this act shall be paid out of the general funds of the State and for the services required by this act to be rendered the circuit clerk is hereby authorized to collect a fee of 25c for each receipt issued with tax." (Acts 1919, p. 1079.)

It therefore follows from a careful reading of this section that the 25c fee is to be collected in addition to the tax, and the 25c is to be paid by the owner which goes to the clerk and the \$1.00 or \$2.00, as the case may be, is to be paid into the State Treasury.

Very truly yours,

J. Q. SMITH,
Attorney General.

COUNTY COURTS; SURETY BONDS:—Code section requiring probate judge to act as clerk of county court having been repealed and clerk provided for, Code section requiring bond from probate judge for such duty is also repealed.

October 27, 1919.

Hon. O. B. Cornelius,
Probate Judge,
Ashland, Ala.

Dear Sir:

I have your letter of the 22d inst.

I concur in the opinion set forth in your letter to the effect that the Act approved August 22, 1919 (Acts 1919, p. 200), repealing Section 6698 of the Code, and making clerks of the Circuit Courts ex officio clerks of the county courts, etc., has the effect of placing upon such clerks the duty of collecting and handling all fines and forfeitures, and that by reason thereof Section 6697 of the Code relating to the giving of bond by the Probate Judge as ex officio judge of the county court is impliedly repealed.

Section 6696 of the Code vests in the Probate Judge, as ex officio judge of the county court, the exercise of a purely judicial function in the exercise of which alone there is no reason for the making of a \$5,000 bond, as required by Sec-

tion 6697 of the Code. Section 6698 of the Code vested in the judge of probate the ministerial function of acting as clerk of the county court, in which capacity he was required to collect and handle moneys, fines and forfeitures, for the safe-guarding of which the judge of probate as judge of the county court was required to enter into a bond in the sum of \$5,000.

The act of 1919 repeals said section 6698 of the Code which required the probate judge to handle moneys, and places that duty upon the clerk of the circuit court, which necessarily in my opinion impliedly repeals Section 6697 of the Code requiring bond for the purpose of guaranteeing the safe handling of moneys collected under duties arising out of Section 6698 which is expressly repealed by the 1919 act.

The laws of the State do not require officers exercising judicial functions solely to enter into official bonds or to collect and handle moneys, while on the other hand the clerks of the circuit courts are by law required to handle moneys and to make bonds to provide for the safe handling of such funds. Inasmuch as the duty of handling moneys is, by the repeal of Section 6698 of the Code, removed from the judges of county courts, leaving with them the exercise of a purely judicial function, I am of the opinion that the duty of giving bond for the faithful performance of the ministerial duties formerly required—is terminated and that such bond is not longer required. It will also be noted that by Section 4 of the act which repeals Section 6698 of the Code, the clerk of the circuit court is required to furnish a bond as ex officio clerk of the county court.

The line of reasoning herein pursued is supported by the decision of the Supreme Court in the case of Roden v. Griffin, 60 So. 925. The facts in that case were that Section 7803 of the Code placed a limitation of \$500.00 per year upon the compensation of deputy solicitors; an act was approved, Acts 1900-01, p. 1342, conferring additional jurisdiction upon the county court of Cullman County, which among other things, provided that the county solicitor should receive the same fees as for similar services in the circuit court. The contention that the \$500.00 limitation applied to the county solicitor was disposed of adversely by the Supreme Court which held that the act referred to the deputy solicitor and that the act repealed Section 7803 of

the Code in so far as it required the deputy solicitor of such county to retain for services rendered in the county court not to exceed \$500.00, and that he was entitled to retain all the fees provided for State cases conducted by him in the county court at the same rate as provided for similar services in the Circuit court.

In other words the act was held to be inconsistent with Section 7803 of the Code as to Cullman County, for the reason that the act left no ground for the operation of that Section of the Code. Likewise, in this instance, the Section of the Code, 6698, requiring the judge of the county court to act as his own clerk, having been expressly repealed, Section 6697, which required him to enter into bond to insure the faithful performance of his duties as such clerk, is also repealed.

It will be noted from Section 6 of the Act that it does not apply to counties in which the clerk of the circuit court is paid a salary.

Yours truly,
J. Q. SMITH,
Attorney General.

ROADS; HIGHWAY COMMISSION; DEPARTMENTAL EXPENSE:

—Members of Commission are entitled to traveling expenses for attending public meetings in the interest of extending highways.

October 27, 1919.

Hon. W. S. Keller,
State Highway Engineer,
Capitol, City.

Dear Sir:

The Attorney General's office is in receipt of your communication of the 24th inst., asking whether the act creating a State Highway Department, approved September 30, 1919, (House Bill 401. Acts 1919, p. 890) authorizes members of the Commission to attend meetings in various parts of the State held for the purpose of establishing or promoting highways and to have their traveling expenses paid for such service.

In reply I beg to advise: Section 1 of said act provides in part as follows:

"The members of said Commission shall serve without compensation but they shall each be allowed traveling and other expenses incurred in the discharge of their official duties."

Section 17 of said Act provides (inter alia) :

"It shall also pay out of said fund the necessary expenses of said Department of every description, including traveling expenses of the officials and engineers, foremen and clerks while in the actual performance of their duties."

This being true, it only remains in answering your question to ascertain whether attendance at meetings designed to promote or establish highways is one of the duties of a commissioner, within the intent and provision of said Act.

Section 2 of said Act provides (inter alia) as follows :

"The State Highway Commission shall consider and determine all questions relating to the general policy of the State Highway Department and the conduct of the work. It shall receive and consider the reports of the State Highway Engineer *and act for the State Highway Department in all matters which have not been especially delegated by law to the State Highway Engineer.*"

Section 18 of said Act provides :

"The State Highway Commission may make such changes or additions to the system of State Trunk Roads *as it may deem proper* and construct or maintain the same with State aid under the provisions of this Act."

Section 23 of said Act provides (inter alia) :

"That the State Highway Commission or Highway Department shall *locate*, construct and maintain the Highways or State Trunk roads so as to connect," etc.

Section 11 of said Act provides that the Commission *may prescribe rules and regulations* to be observed with refer-

ence to constructing or maintaining trunk roads in the several counties and further that applications therefor shall be considered *and approved* by said Commission.

In view of the above excerpts from the Act, it would appear that it is not only within the competency and authority of the Commission to attend meetings for the purpose of viewing the locus quo but to hear and investigate the reason or facts that make for or against the construction of any proposed road.

I am of the opinion, therefore, that a careful and prudent administration of the law, having regard to the proper location and establishment of highways and a judicious expenditure of public moneys demands or recommends that the Commission or members thereof (expected to vote upon or approve any proposed project) should attend public or other meetings in the interest and furtherance of proper highways, under such rules and regulations as may be established by the Commission.

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

COUNTY COURTS; SHERIFFS:—It is duty of clerk to tax costs and fees and his action may be reviewed by judge on motion to retax costs. Sheriffs not entitled to increased fees during their term except for feeding, guarding or transferring prisoners.

October 28, 1919.

Hon. M. McFountain,
Judge of Probate,
Monroeville, Ala.

Dear Sir:

I have your letter of the 25th instant.

You state that the Clerk of the Circuit Court as ex officio clerk of the County Court, is charging up sheriff's fees in Monroe County, on the basis of the new scale of fees adopted by the Legislature of 1919 (Acts 1919, pp. 4, 1030) and collecting on that basis and ask:

First; whether you as judge have the right to instruct the Clerk as to what scale of fees shall be charged, and whether the responsibility for such charges is on you or the Clerk, and;

Second; what scale of fees the present sheriff is entitled to receive?

Referring to the scale of fees the sheriff is entitled to collect, Section 68 of the Constitution provides that the Legislature shall have no power to increase or decrease the fees and compensation of officers *during their term of office*, provided this Section shall not prevent the Legislature from increasing or diminishing at any time the allowance to Sheriffs or other officers for *feeding, transferring or guarding prisoners*.

In my opinion the Sheriff is not entitled to collect fees which have been increased during his term of office unless such increased fees relate to feeding, transferring or guarding prisoners.

It is the duty of the Clerk to tax costs and fees and his action in so doing can be brought before you for decision on motion to retax costs. I can see no impropriety, however, in your stating your views on the subject to the Clerk of the Court, who will doubtless be able to explain it to the Sheriff and satisfy him.

Yours truly,
J. Q. SMITH,
Attorney General.

SCHOOL SYSTEM; ELECTIONS:—Proceeds of 3-mill school tax voted by district may not be used in erecting dormitory for agricultural school serving an area larger than the district.

October 29, 1919.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

I am in receipt of your inquiry of October 25. You desire to be advised whether the Abbeville school district can vote to levy a three mill tax, and apply the proceeds to the erection of a dormitory for one of the State Secondary Agricultural schools, located in that town.

The authority under which such a levy would be authorized would be an election held under Article XIX of the Constitution. This Article provides that a school district may levy not exceeding a three mill tax for public school pur-

poses; provided that the rate of such tax and the length of time it is to continue, and the purpose thereof, shall have been first submitted to the vote of the qualified electors of the District and voted for by a majority of those voting in such election and the funds arising from the special school tax levied in any district which votes the same independently of the county *shall be expended for the exclusive benefit of the district.*

The question which arises then is whether the use of the funds raised by such a tax levy in the erection of such a dormitory would be an expenditure made for the exclusive benefit of the Abbeville school district. My information is that the Agricultural School in question serves a much larger area than the Abbeville school district; if this is the case, I am of the opinion that the purpose and intent of the Constitution would be violated if the provision in question was used to secure a fund for the erection of such a building.

Yours truly,

L. E. BROWN,
Assistant Attorney General.

CIRCUIT SOLICITORS:—A deputy solicitor appointed by solicitor of circuit to which his county then belonged, and re-appointed after the re-circuiting act of 1919 by the solicitor of the circuit to which the county was assigned by said act, has served continuously, de facto if not de jure, and is entitled to compensation for the full time.

October 29, 1919.

Hon. Frontis H. Moore,
Attorney at Law,
Wetumpka, Ala.

Dear Sir:

I have your letter of the 27th inst., and note you state you were appointed County Solicitor by Hon. Temple Seibles, Solicitor of the 15th Judicial Circuit, which formerly included Elmore County, and that since the approval of the re-circuiting bill, you have been re-appointed by Mr. Samford, the present Circuit Solicitor. It is evident that you are Deputy Solicitor.

Section 4 of an act approved September 25, 1915, Acts 1915, p. 819 provides that the several circuit solicitors shall appoint a deputy solicitor in each county of his Circuit, etc. If there was any doubt as to your right to hold the office under the re-circuiting act, that doubt was in my opinion removed by your re-appointment by Mr. Samford, and I cannot see any legal ground for the Treasurer refusing to register your warrant.

As to the interval between the date the re-circuiting act went into effect and your re-appointment by Mr. Samford, if there were any interval—I am of the opinion that you were at least a *de facto* officer, if not *de jure*, and entitled to collect your compensation for that interval. See 9 Am. and Eng. Enc. of Law (2d Ed.) p. 382. I assume, however, that Mr. Samford's appointment dates from the time the re-circuiting act (Acts 1919, p. 858) went into effect.

Yours truly,

J. Q. SMITH,
Attorney General.

COUNTY COURTS; SHERIFFS:—Sheriff receives same fees for services in county court as in circuit court.

Hon. T. W. Russell,
Sheriff,

November 1, 1919.

Monroeville, Ala.

Dear Sir:

I have your letter of the 29th ult.

As I understand your inquiry, you desire to know if sheriffs are entitled to collect fees for services rendered in county courts. Senate bill 549 to which you refer, copy of which is herewith enclosed (Acts 1919, p. 1030) provides that "the sheriff shall receive the same fees as are allowed by law to him for similar services performed in the circuit courts including guard fees where defendants are confined in jail."

I am of the opinion that you are entitled to collect fees for services in the county court at the same rate you are entitled to for similar services rendered in the circuit court.

Yours truly,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS; DEPARTMENTAL EXPENSE; FIRE MARSHAL ACT:—Deputy Insurance Commissioner appointed to deal with fire protection holds at pleasure of Insurance Commissioner, notwithstanding the 1919 Act transferring funds appropriated for his salary to the Fire Marshal's department.

November 1, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

I see no reason why the salary of Mr. Fonville as a deputy insurance commissioner, appointed under the authority of the Act of 1909, to provide for the investigation of fires (Acts 1909, p. 321 et seq.), may not be paid out of the funds accumulated under Section 5 of said act, notwithstanding the provision contained in Section 19 of the 1919 Act (Acts 1919, p. 1022), creating the office of State Fire Marshal and transferring to the Fire Marshal's Department the unexpended balance that may be on hand collected under authority of the 1909 Act. Under the former act the deputy holds at the pleasure of the Insurance Commissioner, and if Mr. Fonville has held the position of deputy commissioner under the authority of that act, he is in my opinion entitled to be paid the salary which that act provides, out of the funds collected under the authority of the act.

Respectfully,
L. E. BROWN,
Assistant Attorney General.

PROHIBITION LAWS:—\$50 informer's fee not being chargeable to the convict fund nor the fine and forfeiture fund by Bone Dry Law of January, 1919, the Act of September 29, 1919, provided machinery for collecting same from such funds.

November 1, 1919.

Hon. H. C. Hood,
Circuit Clerk,
Oneonta, Ala.

Dear Sir:

Replying to your communication of the 27th ult., asking the procedure and manner in collecting the sum of \$50.00, allowed as an informer's fee by section 10, of the act com-

monly referred to as the Bone Dry Law (Acts 1919, p. 11) ; I beg to advise that it was ruled by this office that such fee was not chargeable against the Convict Fund when sentenced to the penitentiary, and where the convict was sentenced to hard labor for the county it was not chargeable against the Fine and Forfeiture Fund; in other words, the statutes specifying the items chargeable make no provision therefor. Accordingly an act approved September 29, 1919 (SB 560, Acts 1919, p. 983) provided the machinery and method of collecting such fees.

I will say for your information, where the convict is sent to the penitentiary the fee is made chargeable out of the Convict Fund on presentation to the Auditor of the certificate from the president of the Board of Convict Inspectors, that the convict has been working out the sentence imposed; and in cases where the defendant is not sentenced to the penitentiary, but to hard labor for the county, the fee is payable out of the General Fund of the County upon presentation of a certificate by the sheriff of the county to the County Treasurer, to the effect that the defendant has begun to work out the sentence imposed, and provided that in each instance the certificates above mentioned shall be accompanied by a certificate from the presiding judge, to the effect that the person claiming said sum is entitled thereto.

Respectfully,
J. Q. SMITH,
Attorney General.

DEPARTMENTAL EXPENSE; BANKING DEPARTMENT:—Superintendent of Banks is entitled to two stenographers, one at \$100 and one at \$85 a month.

November 1, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

The question has arisen as to the employment of a stenographer in the office of the Superintendent of Banks, and I am asked for an opinion as to what assistants he is entitled to.

Under an act approved September 27, 1919 (Acts 1919, p. 818), amending the banking laws, the employment of a stenographer in this Department at a salary of \$100 was authorized and the same act appropriated money to pay the salary. The act has never been repealed and this provision is in force and effect and the Superintendent of Banks is entitled to a stenographer at a salary of \$100 per month under its provisions.

The general salary bill and the general appropriation bill (Acts 1919, p. 988), provided a stenographer at a salary of \$85.00 per month for the office of Superintendent of Banks, so that I am of the opinion that the Superintendent of Banks is entitled to two stenographers, one at \$100 per month and one at \$85.00 per month.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

INSURANCE; FOREIGN MUTUAL COMPANIES:—\$500 deposit required by 1919 revenue act should be required of foreign mutual insurance companies.

November 6, 1919.

Hon. A. W. Briscoe,
Commissioner of Insurance,
Capitol, City.

Dear Sir:

Your communication was duly received, reading:

“Will you kindly advise me at your earliest convenience whether in admitting, under Section 14 of Senate Bill No. 134, approved September 24, 1919, mutual insurance companies organized in other states to transact business in the State of Alabama, the Commissioner of Insurance shall require such companies to make the deposit of \$500.00 as provided in Subdivision (b) Schedule 59 of the general revenue bill, approved September 15, 1919.”

Section 14 of the act entitled “An Act to provide for the organization or admission and the regulation and taxation of incorporated mutual insurance companies other than

life," approved September 25, 1919 (Acts 1919, p. 682, Senate Bill 134 referred to in your letter), reads as follows:

"Upon compliance by any such foreign company with the provisions in this section such company may be licensed and authorized to transact business in this State subject to all the provisions of law relating to information to and examinations by the Insurance Commissioner, annual reports, taxes, and the renewal of license applicable to stock insurance companies transacting the same kind of insurance, except as otherwise provided in this act."

Section 16 of said act provides:

"Section 16. That the taxable premiums or premium receipts of any mutual insurance company organized in or admitted to this State under this Act for the purpose of premium taxation anywhere in this State shall be the gross premiums received during the preceding calendar year for insurance upon property or risks in this State or in the municipalities thereof, as the case may be, from which there shall be deducted return premiums, amounts paid for re-insurance upon which a tax has been or is to be paid to the State, and returns to policy holders other than for losses and such premium taxes shall be payable on or before March first in the following year. The following and no other fees and taxes shall be payable by such mutual insurance companies; The franchise tax based on the amount of capital actually employed in the State; the usual certificate or license fee for each soliciting agent; and the annual license and filing fee, fire marshal tax and usual gross premium tax now imposed by law on reciprocal or inter-insurance exchanges. The above fees and taxes shall be paid to the State. Municipalities may also collect a privilege or license tax on gross premiums at such rate, not higher than the State rate, on gross premiums as may be hereafter fixed by ordinance. The usual ad valorem tax on real and personal property shall also be paid by such mutual insurance companies."

Schedule 59 of Section 361 of the General Revenue Act approved September 15, 1919 (Acts 1919, p. 414), provides (inter alia) :

“Provided, that any insurance company applying for admission to transact business in the State of Alabama shall be required to deposit with the commissioner of insurance the sum of five hundred dollars, to be certified by said commissioner into the State Treasury as are other funds collected by the insurance department. Provided further that any foreign insurance company entering the State shall, on or before March first, remit with their statement to the commissioner of insurance the taxes as required by the first of this section, on business written in Alabama for the preceding calendar year, or fraction thereof, in which they entered. After the insurance company has been operating in this State for one complete calendar year they shall compute their business done in Alabama during said year, and upon this basis they shall pay their taxes for that and the succeeding year, and they shall be allowed credit for said sum of five hundred dollars deposited with the commissioner of insurance toward the payment of said taxes, and if the said five hundred dollars is more than the two years' taxes the State Auditor is authorized to draw his warrant upon the State Treasurer in favor of said insurance company for such excess, upon a certificate from the commissioner of insurance. Each succeeding year the tax shall be based and paid on business done in Alabama for the preceding calendar year, as set forth in this schedule.”

I do not think there is anything in said Schedule 59 with reference to the \$500.00 deposit required of all foreign insurance companies that is repugnant to the provisions of the said act of September 25, 1919.

I am of the opinion that both laws may stand and have a field of operation. I, therefore, advise that the \$500 deposit should be required of foreign mutual insurance companies.

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

TRIAL TAX; COSTS AND FEES:—\$3 trial tax should not be taxed in garnishment proceedings on judgment.

Hon. W. J. Waldrop,
Clerk of Circuit Court,
Birmingham, Ala.

November 7, 1919.

Dear Sir:

I beg to acknowledge receipt of your letter of November 1, in which you ask to be advised as to whether or not the trial tax of \$3.00, imposed by Section 41½ of the Revenue Law of 1919 (Acts 1919, p. 284), should be taxed on garnishment proceedings on a judgment.

I am of the opinion, and so advise, that where a judgment is obtained and garnishment proceeding is had on that judgment, that it is an ancillary proceeding and not a new case, and therefore the fee of \$3.00 should not be taxed.

Yours very truly,

J. Q. SMITH,
Attorney General.

ROADS; HIGHWAY DEPARTMENT:—Contracts for road construction initiated under 1911 Act may be continued and paid for under 1919 Act.

Hon. W. S. Keller,
State Highway Engineer,
Capitol, City.

November 7, 1919.

Dear Sir:

The Attorney General is in receipt of your communication reading:

“There are now being executed in the State a number of State and Federal Aid Projects—on some of these the work is being done under contract and on others the work is being done by county forces. All of these various projects were duly approved by the former State Highway Commission and the State obligated in small amounts to these various projects.

“Can the State Highway Department now, under the Act approved September 30, 1919, a copy of which is herewith enclosed, pay to the various counties the amount of money which they are entitled to under the old State Highway Law, approved April 5, 1911. I

respectfully refer you to Sections 8½, 11, 12, 13 of the new law."

Under the act creating a State Highway Commission defining its powers, duties, etc., approved April 5, 1911—which was expressly repealed by act approved September 30, 1919, creating a State Highway Department—contracts for roads, culvert and bridge construction were taken and let in the name of the several counties. The machinery provided under the 1911 act by which State moneys might be paid out is destroyed by the repeal of that act.

The new act of September 30, 1919 (Acts 1919, p. 890), makes no provision for carrying on the unfinished work of the former Highway Commission. The provision under section 8½ of the act of September 30, 1919, is operative only where the work on the project "begins after the passage of this Act."

Under section 11 of the act of September 30, 1919 (Acts 1919, p. 894), the Highway Commission created by that act may, however, carry on highway projects, paying for same out of the State Highway Fund as it may deem proper and it would seem that under this authority it might complete any unfinished work needful or desirable as a part of the highways within the contemplation of the said section; not however as having any connection with the former Highway Commission's projects or powers but aside from and independent of the 1911 act and as independent and new projects, deriving authority therefor from said Section 11.

Respectfully,

RICHARD EVANS,
Assistant Attorney General.

INSURANCE; LICENSES; TAXATION:—Privilege tax is based upon premiums on business done in this State, which includes premiums collected from non-residents where applications were taken in Alabama.

Hon. A. W. Briscoe,
Commissioner of Insurance,
Capitol, City.

November 7, 1919.

Dear Sir:

The Attorney General's office is in receipt of your communication asking for opinion and reply.

You ask for an interpretation of subdivision (b) Schedule 59 of section 361 of the Revenue Act approved September 15, 1919, reading in part as follows:

"Each foreign fire or marine insurance company shall pay one and one-half dollars on each one hundred dollars and every other foreign insurance company shall pay two dollars of the gross premiums received by it for *business done in this State*, less return premiums, whether the same are actually received by said company in this State or elsewhere, during the year ending the 31st day of December preceding, as a tax or license for doing business in this State during the current year." (Acts 1919, p. 414.)

You desire to know if your Department in computing the license or privilege tax, under subdivision (b) of Schedule 59, *supra*, must confine the computation to premiums on policies not only written in Alabama but where the policy holders at the time still reside in Alabama; in other words, should you deduct premiums collected from non-residents of Alabama though the policies were written in this State?

In reply I beg to advise:

The language in said subsection (b) is "shall pay on * * * each \$100.00 of the gross premiums received by it *for business done in this State*" (italics supplied).

Code Section 4583 reads:

"All contracts of insurance, the application for which is taken within the State shall be deemed to have been made within this State and subject to the laws thereof."

The validity of this Code Section has been upheld in *State Life Insurance Co. v. Westcott*, 166 Ala. 192, where the insured contracted in the policy to the contrary.

I am of the opinion that wherever the application upon which the policy was written was taken in this State the premium paid to the insurer upon such policy constitutes "business done in this State" within the purview of the subsection *supra*.

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

INSURANCE; FRATERNAL BENEFIT INSURANCE:—Under Act of 1919 Insurance Department should refuse to issue authority to any society or association to operate with a certain plan of fraternal benefit insurance, although the Act permits the one company now operating on that plan to continue business.

November 7, 1919.

Hon. A. W. Briscoe,
Commissioner of Insurance,
Montgomery, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 9th ult., with reference to Senate Bill No. 205 (Acts 1919, p. 266), requesting a reply.

Section 1 of this act reads as follows:

"Any fraternal benefit society, order or association now operating in this State issuing benefit certificates to its members, in accordance with its laws providing for the establishment of its membership into divisions and classes of the same age of entry may provide in its laws and certificates for the payment of benefits from special funds created for such purpose to the oldest member of the division and class upon the death of a member in the same division and class; provided, that no fraternal benefit society, order or association, not now operating upon this plan in this State shall be hereafter authorized to adopt such plan, or operate such plan in this State."

With reference to the proviso that "no fraternal benefit society, order or association, not now operating upon this plan in this State shall be hereafter authorized to adopt such plan, or operate such plan in this State," you request me to advise you whether your Department, when another society, order or association, operating a like plan, makes application to you for authorization to do business in this State, shall be bound by the proviso and refuse such authorization.

The act limits the right to do business according to the particular method set forth therein, to those engaged in the use of that method at the time of the approval of the act. You state in your letter that the act deals with "a cer-

tain insurance society now operating in Alabama." It will be noted, however, that the act provides that "any fraternal benefit society," etc., and does not confine the provisions of the statute to a single society, although as a matter of fact only one society may be using that plan in the State at this time. It appears from the act that an exclusive right is not conferred upon a single society but the act relates to all companies which might fall within the class doing business on the plan mentioned.

The act in effect inhibits the further authorization of such societies in this State. It was within the power of the Legislature to withhold altogether the right to do business according to the plan mentioned, and I am of the opinion that it also had the power to withhold the right to do business according to that plan in the future. The result is the same as if the Legislature had enacted a law prohibiting anyone from doing business upon that plan in the future, with the insertion of a proviso that such act should not affect the right of any concern already engaged in operating under such plan to continue to do so.

The Legislature may have considered some other plan to be more acceptable but did not wish to injure any concerns already doing business in the State on that basis by putting an end to such business. However, that may be, it seems to me that it would be unsafe for you to act upon the assumption that the law is invalid, even if there were any ground that obviously warranted that conclusion, and that the only safe course for you to follow is to refuse to issue authority to any similar concern which might apply for such authority, if such application should be made, and let such concern, if it should see fit to do so, raise the question as to the validity of the law.

Yours truly,
RICHARD EVANS,
Assistant Attorney General.

CONVICTS; COSTS AND FEES:—Where county convict escapes there is no provision of law protecting State witnesses whose fees should have been made from hard labor by the convict.

November 8, 1919.

Hon. G. C. Walker,
Solicitor,
Clanton, Ala.

Dear Sir:

I have your letter of the 7th instant.

I assume you refer to a county convict. If so, there appears to be no provision for payment of witness fees in a case of the kind to which you refer.

The question raised appears to be controlled by Section 6660 of the Code of 1907, which provides that the fees of witnesses subpoenaed on the part of the State, must be taxed against the defendant, if he is convicted.

In this case defendant was convicted, but it appears from your letter that the prisoner escaped before working out the costs. There appears to be no method by which such witnesses can be paid unless the county, in its contract with the party to whom the prisoner was leased, made provision for payment of the costs by the lessee in the event he should allow the convict to escape.

Yours truly,
J. Q. SMITH,
Attorney General.

TAXATION; PROBATE JUDGE:—Mortgages presented for record should be accompanied by a certificate that the privilege tax is paid by the lender.

November 12, 1919.

State Tax Commission,
Capitol.

Gentlemen:

Referring to the inquiry contained in the letter of Judge J. P. Stiles, of Birmingham, Alabama, addressed to the Attorney General, dated November 10, 1919, which is transmitted herewith, I beg to advise:

I am of the opinion that a certificate to the effect that the privilege tax is paid by the lender, must accompany all in-

struments filed for record that are subject to the mortgage or privilege tax. The certificate is necessary where deeds are offered for record showing a balance of purchase money due the same as where a mortgage is offered for record.

I would be obliged if you would communicate this information to Judge Stiles, as we are referring the communication to you rather than answering it direct.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

CIRCUIT COURTS; COURT REPORTERS:—Act of 1919 in regard to appointment of court reporters does not apply to Jefferson County, and does not affect appointment of reporters for criminal divisions.

November 13, 1919.

Hon. J. C. B. Gwin,
Judge, 10th Judicial Circuit,
Bessemer, Alabama.

Dear Sir:

In your communication of the 6th inst., you ask if the 1915 Act authorizing the appointment of a court reporter (Acts 1915, p. 859) as amended by an act approved September 5, 1919 (Acts 1919, p. 268), entitled an act "To amend an act approved September 25, 1915, entitled "An Act to provide for the appointment of an official court reporter by each circuit judge in Alabama; to fix their compensation, define their duties and provide for special reporters in certain cases," curtails or destroys the power existing under said 1915 Act to appoint a stenographer for criminal divisions authorized by section 10 thereof.

Section 9 of the act approved September 5, 1919, reads:

"Section 9. That this act shall become effective immediately upon its passage. Provided that the provisions of this bill shall not apply to circuits which consist of only one county and have three or more than three judges."

I am of the opinion that the act of September 5, 1919, does not disturb or affect the power conferred under sec-

tion 10 of the act of September 25, 1915 (Acts 1915, p. 861) upon circuit judges to appoint a court reporter for the criminal divisions authorized by said section 10.

Respectfully,

J. Q. SMITH,
Attorney General

ROADS; HIGHWAY COMMISSION:—Member of State Highway Commission under Act of 1919 is prohibited from continuing to sell supplies to be used in road construction.

November 13, 1919.

Hon. W. S. Keller,
State Highway Engineer,
Capitol, City.

Dear Sir:

The Attorney General's office is in receipt of your communication of the 8th inst., in which you ask whether a member of the State Highway Commission who has heretofore furnished various counties with road supplies may continue to sell the road supplies and equipment to counties of the State where said counties are using State aid in the construction of roads or bridges and said materials so purchased will enter into the construction thereof. In reply I beg to advise that Section 10 of an act approved September 30, 1919 (Acts 1919, p. 894), entitled "An Act to create a State Highway Department, etc., provides:

"No member of the State Highway Commission, the State Highway Engineer or any other person in the employ of the State Highway Department shall be either directly or indirectly interested in any contract for the construction or maintenance of any road or bridges in the State or in the sale of any machinery, material, or anything whatever entering into the construction, maintenance or repairs of said roads and bridges, and any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$200.00 nor more than \$500.00 and may be sentenced to hard labor for not more than one year."

I am, therefore of the opinion that said section 10 interdicts the selling or contracting with reference to any machinery, materials or supplies entering into the construction of any roads or bridges within this State. The language, it will be observed, is very broad, forbidding such acts directly or indirectly and of "*anything whatever* entering into the construction, maintenance or repairs of said roads and bridges." Contracts entered into in violation of this act could not be enforced being void as against public policy as announced by the act and besides the offending member would be amenable to criminal prosecution.

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

MUNICIPALITIES; OFFICE HOLDERS:—Mayor and aldermen hold office until successors are elected but may be compelled to call election if they fail and refuse to do so.

November 15, 1919.

Hon. Thos. E. Kilby, Governor,
Capitol.

Dear Sir:

Replying to the enclosed letter from Judge E. A. Hammett, of Talledega, Alabama, with reference to the Mayor and City Council of Talledega Springs, Alabama, in which he states that for several months the Town of Talladega Springs has been without a mayor and council, the town having failed to elect such officers at the time for election, I beg to advise that it was the duty of the Mayor and City Council to call an election for their successors in office. Having failed to call the election, they hold office until their successors are elected and qualified, as provided in Sections 1164-1171, inclusive, of the Code of Alabama, and particularly Section 1170; and upon their failure to call the election, some person should demand that they call the election, and upon their refusal, an application should be made to the Circuit Court for a mandamus to compel the Council to take action as provided for in Section 1170 of the Code.

Yours very truly,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS; JURY COMMISSIONER:—A jury commissioner who has two or more suits pending at the time of his appointment is ineligible and may be ousted. In the meantime he acts as a de facto officer.

November 21, 1919.

Hon. W. D. Nesbitt,
Capitol, City.

My dear Sir:

Complying with your oral request for the expression of an opinion as to the right of a jury commissioner to hold such office who was a party to two or more suits pending in his county at the time of his appointment, I beg to advise as follows:

Section 2 of an Act approved August 31, 1909, Acts 1909, p. 305 (306) (referred to by you) so far as pertinent to your inquiry reads as follows:

“Section 2. No person except as herein otherwise provided shall be *eligible to be appointed or to hold office as jury commissioner* or clerk of a commission who holds any office under the Federal, State, County or municipal governments * * * nor shall any person who has *two or more pending suits for or against him triable by jury* in any State court of record in the county be eligible to appointment as jury commissioner,” etc. (Italics supplied).

If at the time of the appointment of a jury commissioner there were pending in a court of record in his county two or more suits triable by jury, he was, ex vi termini disqualified to hold such office and ineligible for appointment.

An analogous situation was presented in the case of *Seals v. State, Ex Rel. Matthews*, 164 Ala. 582. In that case the law provided (Section 1231 Code 1907) that no one should be eligible to the office of police commissioner unless he was a resident of the city at the time of his election. Accordingly, it was held that where one (Carl H. Seals) was, at the time of his election to the office of police commissioner, a resident of “Mountain Terrace,” a suburb or district then not within the city limits of Birmingham, he was ineligible to hold the office; notwithstanding the fact that subsequent to his election and before he took of-

fice, "Mountain Terrace" was legally annexed and incorporated into the city of Birmingham. The subsequent annexation did not by relation back, cure the disqualification prescribed by the statute which plainly required that he be a resident of the city *at the time of his election*.

However, the right of ouster or removal resides only in the courts and they only can pronounce upon the ineligibility, since the term of the office of jury commissioner is fixed by statute at three years and not at the pleasure of the appointing power. The acts of the jury commissioner, however, would be valid as a *de facto* officer. (Section 1473 Code 1907).

In the case you have in mind if the state of facts should be such as to bring them within the interdiction of said Section 2, I am of the opinion that upon quo warranto proceedings the ineligible jury commissioner could and would be ousted.

Yours truly,
RICHARD EVANS,
Assistant Attorney General.

MORTGAGE TAX:—Same tax is due on extension of mortgage as on original instrument.

November 22, 1919.

State Tax Commission,
Capitol, City.

Gentlemen:

The Attorney General's office is in receipt of a letter from Judge J. P. Stiles of Birmingham asking if a mortgage tax is required to be paid upon the filing for record of an extension agreement of a mortgage already of record. In reply to this quaere I am forwarding my opinion to your office and taking the liberty of forwarding a copy of same to Judge Stiles.

I beg to advise:

Schedule 71 of section 361 of the Revenue Act (Acts 1919, p. 420), approved September 15, 1919, relates to the tax exacted or required for the privilege of recording mortgages, etc. Subsection (e) of said Schedule 71 provides as follows:

“(e). When the time for the payment of the indebtedness secured by any such mortgage deed of trust, contract of conditional sale, or other instrument in the nature of a mortgage is extended or renewed and the extension or renewal of contract is offered for record, the tax required in this schedule shall be paid on the amount of indebtedness so extended or renewed and the same shall be governed in all respects by the provisions of this subdivision,” etc.

The language and intent of subsection (e), supra, is unequivocal and directly to the point that a privilege tax is required for admission to record of extension agreements renewing or extending the maturity of debts secured by mortgage.

Respectfully,
RICHARD EVANS,
Assistant Attorney General.

CIRCUIT SOLICITORS:—Fees in cases of conviction for carrying concealed weapons fixed at \$30.00.

November 24, 1919.

Hon. B. G. Wilson,
Solicitor, Circuit Court.
Demopolis, Alabama.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 21st inst., with reference to solicitors' fees in cases of conviction for carrying concealed weapons.

The fee in all such cases is fixed at \$30.00 by the provisions of an Act of the Legislature of 1919, approved September 30, 1919 (Acts 1919, p. 981).

Section 6421 of the Code makes the carrying of a pistol concealed a criminal offense, and Section 6634 makes the solicitors' fees for convictions in such cases \$30.00. An Act of 1909, page 258, created the additional offense of carrying a pistol on premises not one's own. The provisions of Section 6634 of the Code not applying to the Act of 1909, the general provisions of Section 6634 for fees of \$10.00 for convictions in misdemeanor cases not otherwise pro-

vided for, applied, and the last act of the Legislature made the fee uniform in all cases, fixing it at \$30.00.

Yours very truly,

LAMAR FIELD,
Assistant Attorney General.

LICENSES:—Penalties for delinquency not due unless citation has been served or criminal prosecution commenced.

November 24, 1919.

State Tax Commission,
Capitol.

Dear Sirs:

The accompanying correspondence calls attention to the question as to when the penalty should be collected, along with a license which has been allowed to become delinquent. I am answering the question so that you can pass it along to the probate judges of the various counties, if you see proper. I suggest particularly the advisability of communicating with Judge Stiles on the question.

The conclusion I have reached is as follows: That where a license such as that provided by schedule 125 or 126 is allowed to become delinquent, the judges of probate are not permitted to collect the penalty provided in section 366 of the 1919 Revenue Act (Acts 1919, p. 442), where there has been no citation issued and served on the delinquent to show cause why he should not pay the license, or no criminal prosecution commenced by service of process; but where citation has been issued and served, then the penalty of 15% should be collected.

Yours truly,

L. E. BROWN,
Assistant Attorney General.

ROADS; HIGHWAY COMMISSION; DEPARTMENTAL EXPENSE:—Highway Commission must judge for itself whether attendance upon certain meetings is in line with discharge of official duties.

November 28, 1919.

Hon. W. S. Keller,
State Highway Engineer,
Capitol.

Dear Sir:

Replying to your inquiry in regard to paying the expense of the members of the State Highway Commission while attending certain meetings, I call your attention to an opinion rendered on August 10, 1916, by me, found on page 394 of the Biennial Report of the Attorney General for the years of 1914-16, wherein it was held that where the purpose of the contemplated trip was in furtherance of the duties imposed upon the members of the Commission, the expense should be properly chargeable as expenses incurred in the performance of duties as members of the Commission. The same holds true with reference to the new Commission appointed under the new Highway Department Act, approved September 30, 1919 (Acts 1919, p. 890). If the members are in the discharge of their official duties in attending the meetings in question, then I am of the opinion that the expense is a proper charge against the department funds. On this point the Commission should be able to judge for itself.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

SCHOOL SYSTEM; ACCOUNTING:—Fees collected on examination of teachers are to be paid into the State treasury to credit of general educational fund, and expenses of holding examination are to be paid by warrant from the treasury.

November 28, 1919.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

Replying to your inquiry of the 21st, I beg to advise that I am of the opinion that there is no conflict between the act

approved September 26, 1919 (Acts 1919, p. 737), to make appropriations to the State Department of Education, which act provides that all fees collected for the certification of teachers and all enrollment fees in the placement division shall be paid into the State Treasury, and the general educational code, approved the same day, which provides, in section 14 (Acts 1919, p. 573), that the fees paid by applicants for teachers' license shall be certified into the State Treasury *to the credit of the general educational fund*.

I therefore advise that the fees collected for certification and enrollment of teachers should be certified into the State Treasury to the credit of the general educational fund.

While the result might be the same where you authorize the retention by the County Superintendent upon his sworn statement from the proceeds of the fees paid by applicants for teachers' licenses, the amount to cover the expenses for which provision is made under section 14 of the educational code, I am of the opinion that an exact compliance with the statute would require that the gross income from the examination of teachers be certified into the State Treasury to the benefit of the general educational fund, and the expenses of holding examinations paid by warrant against the general educational fund, upon receipt of proper expense account.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

COUNTY COURT; COSTS AND FEES:—Ex-officio clerk of county court has no authority to issue warrants of arrest. Trial fees of clerk are same in county court as in circuit court. Only one trial fee, of \$5, taxed in each case.

December 1, 1919.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol.

Dear Sir:

I have been asked the following questions by the Clerk of the Circuit Court of Jackson County:

"Do I, as ex-officio Clerk of Co. Court issue the warrant of arrest or does the judge, and if I issue it, am I allowed the fee of 50c allowed to me for issue of writs of arrest in Circuit Court?

"I am allowed in Circuit Court a Trial fee of 50c and a fee of 25c for entering up judgment. Am I allowed these fees in County Court, and if so, shall I collect from Defts. and pay into County Treasury the full \$5.00 Trial fee provided in Section 6655 and also the new Act."

As the questions now answered are of general importance, I am answering them as though propounded by you, and ask that you send a copy to the Clerk of Jackson County Circuit Court.

1. I am of the opinion that the ex-officio Clerk of the County Court has not the authority to issue warrant of arrest, but that the warrant of arrest should be issued by the Judge of Probate. Of course it follows that the Clerk would not be allowed the fee of 50c for issuing the warrant.

2. I am of the opinion that the ex-officio clerk is entitled to a trial fee of 50c and a fee of 25c for entering up judgment, being the same fees allowed for the same service in the Circuit Court. I am also of the opinion that the fees provided in section 6655, as set out in the Act to regulate costs, etc., approved September 29, 1919 (Acts 1919, p. 1030), should also be taxed as costs in County Court cases, that is, to the extent that the services, fees for which are enumerated in the act last above referred to, are performed by the Judge of the County Court.

The act last above referred to was not intended to set out a new or additional schedule of fees, but intended to indicate which of the fees provided by section 6655 of the Code were to be collected and paid into the County Treasury to provide a fund from which the Judge's salary might be paid. In every case, of course, there would be a trial fee of \$5.00, but only one such trial fee.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

LICENSES; LABOR AGENTS:—Each employee or partner of a labor agent must pay separate license.

December 2, 1919.

Hon. George Ross,
Bessemer, Ala.

Dear Sir:

In reply to your inquiry of November 29, asking for a construction of schedule 129 of the 1919 Revenue Act (Acts 1919, p. 439), with reference to labor agents, I beg to advise that the act provides: "All assistants, sub-agents, partners, associates, or employees of any such person shall be subject to the license hereby levied, whether such license be paid by their employer, principal, partner, associate, or not."

It seems, therefore, clear that the act intended to provide that not only the principal, but all employees in the business should pay a separate license, and the language seems to be broad enough to require that the persons who keep the books and check freight, and hire vehicles to haul the emigrants, household goods or baggage to the depot for shipment, would each be liable for the license, the same as the principal agent.

Yours truly,

J. Q. SMITH,
Attorney General.

MILITARY DEPARTMENT; DEPARTMENTAL EXPENSE:—Adjutant General is authorized to employ such clerical assistance as may be necessary for proper conduct of department.

December 2, 1919.

Major Hartley A. Moon,
Acting Adjutant General,
Capitol.

Dear Sir:

Replying to your inquiry of December 2, I beg to advise that I am of the opinion that under the Act to Regulate and provide for the military forces, approved September 19, 1919 (Acts 1919, p. 472), you are authorized to employ such clerical assistance as is necessary for the proper con-

duct of your Department, subject of course to the approval of the Governor.

Yours very truly,
J. Q. SMITH,
Attorney General.

ELECTIONS:—Writs of election to sheriffs are not required for special elections on constitutional amendments to be submitted December 29, 1919.

December 3, 1919.

Hon. Thos. E. Kilby,
Governor,
Capitol.

Dear Sir:

Answering your inquiry, "Whether writs of election should be issued by you to the sheriffs of the counties directing that the election be held on the constitutional amendments which are to be submitted to the electors on December 29, 1919," we respectfully advise:

That such writs of election are required to be issued by the Governor in all special elections provided for by Article 19 of Code 1907. Section 441, Code 1907. Elections on constitutional amendments are not one of the special elections provided for in this article. Section 439, Code 1907. Therefore unless it is otherwise provided by law that constitutional amendment elections are such special elections as contemplated by subdivision 5, section 439, Code 1907, this section 441 requiring writs of election to issue does not apply to these elections.

Section 284 of the Constitution of Alabama, 1901, provides that if elections on constitutional amendments are held on a date other than that of a general election, "the election shall be held in all things in accordance with the law governing general elections." Following this provision, section 4 of each act submitting the proposed constitutional amendments to the people provides that "The election shall be held in all respects in accordance with the law governing general elections and with constitutional provisions concerning amendments to the Constitution." See Pamphlets of Bills No. 488 and No. 650. By these special

provisions these elections are governed by the law governing general elections and would, therefore, not be affected by provisions relating solely to special elections.

Such writs were issued in special elections to require the sheriff of the county to give the notice of the election required by law. Section 443, Code 1907. In general elections sheriffs are required to give election notices without such a writ. Section 357, Code 1907. Therefore no such writ is necessary under the general election law. By virtue of the provisions of an act approved September 18, 1915, the notice given by the sheriffs of elections on proposed constitutional amendments is by "posting up near every voting place and one other public place in every precinct in every county by the sheriff of the county the proclamation of the Governor," at least sixty days prior to the election, which poster is prepared and furnished by the Secretary of State. Acts 1915, page 602.

Thus it will be observed that there are no provisions in any of the laws relating to elections on constitutional amendments that require the Governor to issue to the sheriffs of the counties writs of election.

Respectfully,
J. Q. SMITH,
Attorney General.

LICENSES; CHAUFFEURS:—Employees of private concerns or of municipalities are not required to take out chauffeur's license, but only where vehicle is for public use.

December 4, 1919.

State Tax Commission,
Capitol.

Dear Sirs:

This office is in receipt of a letter from Hon. B. C. Jones, Mayor of the City of Bessemer, asking for an opinion on the following questions:

"Is a person driving a truck for private business, such as delivery trucks for merchants, required to have chauffeur license?

"Are employees of cities and towns driving trucks required to have such license?"

In reply, I beg to advise that the provision with reference to chauffeurs' license contained in the 1911 act was not changed by the amendment adopted September 30, 1919 (Acts 1919, p. 1002), in so far as the question of who should be licensed is concerned, and on March 24, 1911, in an opinion to the Secretary of State the Attorney General's office held that only those persons were liable to the chauffeur's license who did business for the public; that is, where the automobile was open to hire by any person desiring to use it.

The particular question before the Attorney General at that time was whether a salesman for the Standard Oil Company, using the automobile of his employer in the conduct of the business of his employer, was required to be licensed as a chauffeur, and the opinion held that he was not.

I am further of the opinion that employees of cities and towns driving municipal owned trucks are not required to have chauffeur's license.

I am handing you an extra copy of this letter, so that you may send it to Mr. Jones.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

STATE PRISON INSPECTOR; BOARD OF CONTROL AND ECONOMY:—Deputy prison inspectors may be employed.

December 5, 1919.

Hon. W. D. Nesbit, Chairman,
State Board of Control and Economy,
Capitol.

Dear Sir:

In reply to your inquiry of December 4, with reference to the pay and employment of additional deputy state prison inspectors, I beg to advise that section 3 of the Act to provide for the creation of state prison inspectors approved April 8, 1911, carries with it a provision for the employment of additional deputy inspectors, and under and by authority of this provision the state prison inspector, by and with the consent of the Governor, was authorized to employ the additional inspectors referred to in your inquiry,

to be paid the same compensation as is paid to the regular deputy inspectors, and the provision of that act carries an appropriation with it. So that on authority of said act the Auditor is authorized to issue his warrants to cover the compensation of additional deputy inspectors duly appointed.

After January 1, 1920, when under the provisions of an Act to confer additional powers on the Board of Control and Economy, approved September 30, 1919 (Acts 1919, p. 1119), the state prison inspection department comes under the control of the State Board of Control and Economy, additional authority for the appointment and payment of the salaries of said deputy inspectors will exist growing out of the general authority of the Board of Control and Economy to provide the necessary employees to carry on operations, for which a blanket appropriation is contained in the original act creating the Board of Control and Economy, as well as in the act approved September 30, 1919, to confer additional powers on the Board of Control and Economy.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

CIRCUIT JUDGES AND SOLICITORS:—Under 1915 Act judges and solicitors are allowed only \$2.00 per day for meals and lodging while away from home under orders.

December 5, 1919.

Hon. H. F. Lee
State Auditor,
Capitol.

Dear Sir:

In answer to your inquiry of November 22, with reference to expenses of judges and solicitors traveling under orders out of their own circuits, I beg to advise that as I construe section 6 of the act approved September 6, 1915, found on page 593 of the Acts of that year, officers are permitted to draw from the State Treasury actual expenses incurred in traveling to and attending such court and returning home; that is, their railroad fare, automobile hire, or expenses of other modes of transportation which they may adopt, and \$2.00 each day they are away from home to

cover meals and lodgings. Under this interpretation where meals and lodgings amount to more than \$2.00 per day, the judge or solicitor can only collect the \$2.00. The connection in which the word "transportation" is used in the Act referred to shows the meaning which was intended to be conveyed by its use.

In construing the Immigration Act which provides that any alien who should be found a public charge of the United States * * * shall be deported at the expense, including one-half of cost of transportation to the port of deportation, of the person bringing such alien into the United States, etc., in the case of *United States v. Hamburg-American Line*, 159 Federal 104, the Circuit Court of the United States held that the term "transportation" as so used should be given its ordinary meaning, viz, carriage from one place to another, and that the phrase "cost of inland transportation therefrom" only include the cost of carrying the alien from the place where he was found to the port of deportation.

I am therefore of the opinion that the judge or solicitor traveling outside of the circuit under orders should be allowed his meals in addition to transportation only when the expense of such meals when added to his hotel bill does not exceed the \$2.00 per day allowed by the statute.

Very truly,

J. Q. SMITH,
Attorney General.

CIRCUIT COURT; FEES:—Clerks should pay trial tax promptly.
Clerk does not receive a commission for collecting the trial tax.

December 5, 1919.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

I am answering herewith two inquiries in regard to the trial tax fee as provided for in the 1919 General Revenue Law (Acts 1919, p. 284). The first inquiry is from Mr. Wm. J. Waldrop, clerk of the circuit court of Birmingham, and is as to when and how often the trial tax should be

paid into the general fund of the State treasury. In this connection I note that you have issued a circular dated November 19th, in which you advise that these payments be made monthly. A very strict construction of the law might require that each fee as collected be paid promptly into the State treasury so that I think that the circuit clerks cannot complain if they are permitted to remit monthly.

The second inquiry is from Mr. Carter H. Rice, clerk of the circuit court of Huntsville, Alabama, who desires to know if he is entitled to a commission of 5 per cent for collecting this tax, the same fee to which he says he is entitled to for collecting fines, forfeitures and solicitors' fees. In reply to this inquiry I beg to advise that I have been unable to find any statutory provision permitting clerks of the circuit court to receive a commission for collecting this tax and in the absence of any such provision it is necessary to hold that they are not entitled to such commission.

I will be obliged if you will communicate the result of this opinion to these gentlemen immediately.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

SHERIFFS; MILITARY DEPARTMENT:—Where there is danger of mob violence the sheriff is required to provide a proper guard. State militia is to be used only in extreme cases.

Hon. Thos. E. Kilby,
Governor,
Capitol.

December 6, 1919.

Dear Sir:

Relative to duties of a sheriff when there is a likelihood of an effort being made to harm prisoners in his custody, we advise:

Section 3869 of the Code of 1907 provides that a sheriff must have one deputy, and may have as many as he thinks proper. The sheriff under the common law, as the preserver of peace, has authority to deputize as many men as necessary to preserve the peace. 25 Am. & Eng. Enc. of Law, 672. Section 138 of the Constitution of Alabama of 1901 subjects the sheriff to impeachment whenever a prisoner suffers death or grievous bodily harm owing to neg-

lect, connivance, or cowardice, or other grave fault of the sheriff.

In the Jinwright case, the sheriff was ordered by the Governor to place a guard at the jail and protect the prisoner at all hazards. The sheriff failed to provide a proper guard from the citizens, and the prisoner was mobbed. Our Supreme Court impeached the sheriff for this neglect of duty and failure to properly comply with the Governor's instructions. *State ex rel. Atty Gen. v. Jinwright*, 172 Ala. 342.

The sheriff is not only responsible for making proper selections of deputies in such case, but he must instruct them the proper precautionary measures to be taken. *Cazalas Case*, 162 Ala. 214.

While the Governor has the authority to use the State militia to enforce laws (Section 131, Constitution of Alabama, 1901), this authority is generally used only in extreme cases, and where a few good determined citizens can protect a prisoner, as in the Jinwright case, the sheriff is required to place such a guard of deputies over the prisoner as he deems necessary to preserve peace and protect the prisoner, and he is required to protect the prisoner at all hazards.

Respectfully,
J. Q. SMITH,
Attorney General.

MILITARY DEPARTMENT; COMPENSATION:—A soldier injured in active service of Alabama National Guard is to be retained in the service and taken care of until restored to health.

December 12, 1919.

Adjutant General of Alabama,
Capitol.

Dear Sir:

1. Your office requested to be advised as to what is the "obligation of the State to a soldier who was temporarily disabled while in the active service of the State on November 16, 1919, where he had been called in case of imminent danger of breach of peace."

2. Section 29 of an act approved September 19, 1919 (Acts 1919, p. 476), provides that "every member of the militia who shall be wounded or disabled while in the active

service of the State * * * when called upon in aid of the civil authorities shall be taken care of and provided for at the expense of the State, and shall be continued in active service of the State until restored to health." Section 23 of the same act provides that enlisted men "employed in the active service of the State shall receive pay and allowance at the following daily rate: Twice the pay now or hereafter provided for like grade in the United States Army." Such soldier, therefore is entitled to be continued in the active service of the State until he has been restored to health and during such time is entitled to pay and allowances provided for those of his grade.

3. The State's obligation is not fully met by retaining such soldier in the active service and allowing him his pay and allowances, but the State must "take care of and provide for him at the expense of the State until he is restored to health." Section 29, *supra*. The phrase "To take care of" has been held to include "to support and maintain, as well as give personal attention." *Caheen v. Gordon* (S. C.), 1 Hill Eq. 51. It implies responsibility for his safety and prosperity. Webster's Dictionary. "Provide" means to supply, to take measure in advance to meet possible needs. Webster's Dict. I am of the opinion that it is the State's duty to take charge of said soldier and provide him that character of quarters, rations, personal attention, medical aid, drugs and supplies as are necessary to the welfare of one in his condition and as are necessary to restore him to health as speedily as possible.

Yours truly,
J. Q. SMITH,
Attorney General.

LEGISLATION; VALIDITY OF BILL; APPROPRIATION:—Bill for relief of R. H. Hudson to pay for services rendered at request of Convict Department is valid.

December 15, 1919.

Hon. C. B. Rogers,
President of Board of Convict Inspectors,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of December 11, in which you ask this department to advise you whether

or not under House Bill 820 (Acts 1919, p. 703), which is an act for the payment of \$110.65 out of any money in the Treasury of the State of Alabama not otherwise appropriated, to be paid to R. H. Hudson, for services rendered in preaching the Gospel at State Convict Camp at Speigner, Alabama, and traveling expenses.

I am of the opinion, and so advise, that a warrant can be drawn against the convict funds for the payment of this amount, as these services were rendered at the instance of the Convict Department, and said department received the benefit of said services, and the payment for said services is a proper charge against said convict funds.

Very truly,

J. Q. SMITH,
Attorney General.

COUNTY DEBT; COUNTY COMMISSIONERS:—Where county has reached constitutional debt limit it may borrow only against its taxes for the current year, and if taxes are otherwise applied the loan may not be renewed another year, nor funds derived from new loans applied to liquidation of first loan.

December 16, 1919.

Hon. Chas. E. McCall,
Chief Examiner, Public Accounts,
Capitol.

Dear Sir:

The letter of Mr. C. C. Brooks, Examiner of Accounts, referred by you to us for opinion on certain matters contains the following inquiry, to-wit:

“(1) Sec. 2 of the act authorizing Courts of county commissioners or boards of revenue to borrow money in anticipation of taxes, Acts of 1915, page 105, provides that such loans shall not be renewed. If a loan made under the provisions of this act is renewed contrary to the prohibition as to such a renewal is the contract void or is the act of renewing the loan merely a violation of law on the part of the officials concerned therein?

“(2) A loan of \$25,000.00 was obtained under the act above referred to and was secured by a certificate

of indebtedness issued or executed in 1916, and made payable Feb. 1, 1917. In January 1917 the commissioners court made provision for another loan due Feb. 1, 1918, of like amount from the same party who made the first loan and a certificate of indebtedness therefor was executed and delivered to the lender, who then rendered a statement to the court as follows:

"To old loan	\$ 25,000.00	
Interest	2,000.00	
Commissions on new loan.....	250.00	
By new loan.....		\$ 25,000.00
Balance due by county.....		2,250.00

"The court then paid the balance due.

"Do the facts stated above constitute such a renewal of the original loan as would make the last named obligation invalid?"

Counties are subordinate branches of the State government, created wholly for civil and political purposes, and are not liable for claims not imposed on them by law, or for which they are not empowered to contract. No officer can charge a county with a claim, however meritorious it might be, unless it is authorized by law. Board of Revenue, etc. v. Drago, Sheriff. 172 Ala. 155; 54 So. 995; Naf-tel v. County of Montgomery, 127 Ala. 563.

Counties do not have the power to borrow money as an incident of its creation, and this right, to be possessed, must be conferred by the Legislature. Gunter et al v. Hackworth, 182 Ala. 205; Brown, Treasurer v. Gay-Padgett Hdw. Co., 188 Ala. 428. That power to borrow money not delegated resides in the Legislature, or some other department of government, and cannot be exercised by a county. Mayor of Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611.

By an act approved March 1st, 1915, counties through their courts of county commissioners are authorized to make temporary loans, for their counties, "in anticipation of the collection of taxes for the year in which such loans are made." The commissioners "issue a certificate covering such loans" and "pledge a sufficient amount of uncol-

lected taxes of the *current year* to secure repayment of such loans." It is provided that "the treasurer shall retain out of the *taxes collected for the year*" a sufficient amount to pay the loans and that such loans "have priority of payment out of the proceeds pledged to pay the same." Section 2 of the act provides that such loans shall not be *renewed*. (Italics ours). (Acts 1915, page 105).

As the power to borrow money cannot be claimed by a county as an incident of its creation, the power to make loans depends entirely upon the authority conferred by this act. It will be observed from the excerpts of the act quoted that the only authority to make loans granted a county is to make temporary loans in anticipation of the collections of taxes, which loans are charges against the taxes of the current year in which the loan is made. No power exists or is granted to make loans during one year which are charges against the taxes of a subsequent year. The renewal of such loan would be in effect providing for the payment of a loan made during one year out of the taxes of a subsequent year. A county is without power to make such loan. Besides, a renewal of such loan is expressly prohibited by section 2 of the Statute. Authorities, *supra*. It follows that a renewal of such loan is void for two reasons, to-wit, 1st, there is a lack of power to make such loan because authority was never granted; and 2nd, it is expressly prohibited by statute.

2. This brings us to a consideration of whether the facts stated in the second section of your inquiry constitute such a renewal as to make the last named obligation invalid.

Whether or not an obligation is a renewal is a matter of fact and can hardly be definitely and conclusively, judicially determined. From the facts stated, we can only discuss the application of the rules governing such matters and the result which would probably ensue from their application.

While a "renewal" is sometimes held to mean an extension of an obligation (*Orr v. Double Page Co.*, 119 S. E. 552), the weight of authority is to the effect that it means to substitute for an old obligation a new one of the same nature. 7 Words & Phrases, 6084. It imports the giving a new obligation like the old one with the same terms and stipulations, the granting a new loan on a new note for the amount of the former one. 14 L. R. A. (N. S.) 962.

As stated, whether or not a loan is a renewal is a question of fact to be determined from the circumstances of each case. The loan is made by the court of county commissioners, and this court "speaks only through its records." "A written memorial is the only evidence which other courts can receive of its proceedings, whether it is of the exercise of judicial powers or of mere ministerial authority and duty." *Franklin Co. v. Richardson*. 79 So. 584. There is nothing to prevent a county from making a temporary loan from the same party for the same amount during different years, if the subsequent loans are not renewals but are bona fide new independent loans. But if it appears from the court's record that the consideration of the new loan is payment of the old loan, that the consideration is a renewal, then the new obligation is void. If the statement rendered the Court which is set out in section 2 of your inquiry appears on the Court's record as the consideration of the new obligation, it is the writer's opinion that the facts show such a renewal as violates the statute and makes the new obligation null and of no binding force. Persons who accept such certificates of indebtedness are charged with knowledge of the limited power exercised by counties, and must, at their peril, take notice of its lack of, or limited capacity to contract. *Mayor of Wetumpka v. Wetumpka Wharf Co. supra*.

If, however, the last loan was a bona fide new loan it would be valid, and a subsequent misapplication of the funds derived from such second loan would not operate to invalidate the second loan. It has been already seen that a county has no authority to make a loan except such as are charges only against the taxes for the current year. *Simpson v. Lauderdale Co.* 56 Ala. 64. The money required to be set aside from such taxes for the payment of such loan cannot be subjected to the payment of any other claim. *Allen v. Watts*, 88 Ala. 497. The lender is thus protected in securing payment out of the taxes of the current year during which the loan was made, but his claim cannot constitute a charge against any other fund or the taxes of any subsequent year or the money borrowed in anticipation of the taxes of any year other than the year in which the loan was made.

It follows that even if the second loan under consideration was a bona fide new loan, that subsequently the lender

knowingly received the proceeds derived from the second loan in payment of the old loan. This appears from the statement rendered the court of county commissioners, according to your inquiry. He is, therefore, knowingly the recipient of misappropriated funds and is liable to the county for the amount so received. *Packard v. City of Mobile*, 151 Ala. 163. The fact that his claim is meritorious and that the taxes set apart to pay his claim were misappropriated, does not affect his liability to the county. Our conclusion is that if the last loan is a renewal, it is void, and the first loan is a claim only against the taxes of the current year during which the loan was made and against no other; if the last loan was valid the application of the funds derived therefrom to the payment of a loan made during a previous year, was a misappropriation of funds, which it appears was known to the recipient thereof, and that such recipient is liable to the county for the amount so received. In view of these conclusions, it is not deemed necessary in this matter to discuss, and it is not intended to intimate, to what extent the records of the court of county commissioners are conclusive as to what is the real consideration and character of such loan.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

CHILD WELFARE DEPARTMENT:—Salary of director is not included in the amount appropriated for maintenance of department, but is in addition to such appropriation.

Mrs. L. B. Bush,
Child Welfare Department,
Capitol.

December 16, 1919.

Dear Mrs. Bush:

In reply to your inquiry of December 15, I beg to advise that I am of the opinion that the act establishing a Child Welfare Department (Acts 1919, p. 694) contemplates that the salary of the director is not to be included within the \$12,400.00 appropriated for its maintenance. In other words, the director's salary is in addition to the \$12,400.00 appropriated.

A similar situation was discussed in the case of *State ex rel. Tax Commission v. Smith*, Auditor, 188 Ala. 432, and

the ruling here made follows the opinion of the Court in that case.

Yours very truly,
J. Q. SMITH,
Attorney General.

LICENSES; CARBONIC ACID GAS:—License under schedule 128 not required from soda founts.

State Tax Commission,
Capitol.

December 17, 1919.

Dear Sirs:

I am in receipt of your inquiry of December 17th desiring an opinion whether the license collectible under schedule 128, section 361 of the Revenue Act of 1919 (Acts 1919, p. 439), should be collected from soda founts, or whether it is limited to manufacturers who bottle soft drinks making use in the bottling process of carbonic acid gas. In reply I beg to advise that I am of the opinion that this schedule was not intended to cover drinks sold at a fountain where they are made. To reach this conclusion or to reach any proper conclusion, it is necessary to read the provision as a whole, and when thus read only the conclusion which I have reached, that is, it was not intended to tax soda fountains, is justified.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

ACCOUNTING; STATE BOARD OF ACCOUNTANCY:—Certified public accountant under laws of another state cannot use the title in Alabama unless also registered under Alabama law. State board not charged with criminal prosecution but any member of board may make complaint.

December 17, 1919.

Hon. M. W. Aldridge, Chairman,
State Board of Accountancy,
Montgomery, Alabama.

Dear Sir:

Your letter of November 15, 1919, has been referred to me for reply. Your first inquiry is as follows:

A New York firm, certified under the laws of that state, but not under the laws of Alabama, maintains an office in Alabama, using on its stationery, reports, and office sign the following words, "Certified Public Accountants, New York." Their Alabama manager, who does work in this state, is not registered under the laws of any state. Is the Alabama act being violated?

Under the provisions of an act approved February 17, 1919 (Acts 1919, p. 124), regulating the practice of public accountancy, it is made unlawful "for any person to assume the title of certified public accountant, or use any letters, abbreviations, or words, to indicate that such a one using the same is a certified public accountant," except one who has received a certificate of qualification from the Alabama State Board of Accountants.

Section 8 of this act makes it a misdemeanor for any person who has not received such a certificate to assume to practice as a certified public accountant, or use the abbreviation "C. P. A.," or any similar words or letters to indicate that the person using the same is a certified public accountant, unless he is registered under the laws of Alabama.

The fact that the firm are certified public accountants under the laws of New York does not prevent them from being liable to the criminal provisions of this statute. While the law provides that the Board of Accountancy may issue certificates to the holders of certificates under the laws of other states, it does not compel the Board to issue such certificates. It would be a violation of the law for a person registered under the laws of another state to practice as a certified public accountant in Alabama, or use any words or letters to indicate that he was a certified public accountant, unless he was registered under the laws of Alabama.

You inquire what is your official duty in this matter. The law does not specifically charge the Alabama State Board of Accountancy with the burden of enforcing the criminal provisions of the act. However, any member of your Board with a knowledge of the facts constituting a violation of the criminal provisions of the law could begin a criminal prosecution against the violator by making proper complaint.

Very truly yours,

HARWELL G. DAVIS,
Assistant Attorney General.

COUNTY DEBT; COUNTY COMMISSIONERS:—Local Act empowering Russell County to borrow money is not necessarily in conflict with the constitutional provision.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

December 18, 1919.

Dear Sir:

In reply to your inquiry (1) "if the act approved July 31, 1907, authorizing the court of County Commissioners of Russell County to borrow money (Local Acts, 1907, page 584) is unconstitutional in violation of subdivision 17 of section 104, Constitution 1901, and (2) whether the certificate of indebtedness evidencing such loan is a valid obligation under said local act where the loan is made for one year and pledges the taxes of the year to secure its payment."

Section 104 subdivision 17 of the Constitution of Alabama 1901, so far as applicable to the matter under consideration is as follows:

"Section 104. The Legislature shall not pass a special, private or local law in any of the following cases: (17). Authorizing any county, city or other political subdivision of the county to issue bonds or other securities unless the issuance of said bonds or other securities shall have been authorized before the enactment of such local or special law, by vote of the duly qualified electors of such county," etc.

The act in question after giving the court of county commissioners of Russell County certain authority to borrow money, provides that "all contracts for money so borrowed shall be evidenced in such form as said commissioners court may direct, provided that no loan contracted under this act shall run longer than three years."

Does this authorize the court of county commissioners to evidence the loan by a bond and thus violate the section of the Constitution heretofore quoted?

All doubts are resolved in favor of the validity of an act, and it must appear beyond a reasonable doubt that it is unconstitutional before it is so declared. *State v. Carter*, 174 Ala. 266. If it can be reasonably construed so as to give it a field of operation that will not infringe the con-

stitutional inhibitions, such constructions will be adopted. *State v. Board of Revenue*, 180 Ala. 489. Constitutional limitations and inhibitions will be read into a statute as a part of it, thus limiting general terms to a field of operation that does not violate the Constitution. *Ex parte City of Birmingham*, 74 So. 51. It is the opinion of the writer that the act can be reasonably construed so as to not violate the provisions of the Constitution hereinbefore set out. By reading the constitutional limitations into the act, it would provide that "all contracts for money so borrowed shall be evidenced in such form as said commissioners court may direct," provided that such loan cannot be evidenced by "bonds or other securities" as prohibited by subdivision 17 of section 104 of the Constitution of 1901.

(2). Is the certificate of indebtedness evidencing such loan a valid obligation under this local act where the loan is made for one year, pledging the taxes of the year as security for its payment?

Just what obligations are included in the terms "bonds or other securities" as used in the section of the Constitution hereinbefore quoted, has not been determined by our Supreme Court. It is evident, however, that it was not intended to prohibit courts of county commissioners from being authorized to issue every kind of written evidence of indebtedness, for it has been held in numerous decisions that such court can issue interest-bearing warrants as evidence of its indebtedness. *Board of Revenue, Shelby County v. Farson, Son & Co.*, 197 Ala. 375; 72 So. 613; *Littlejohn v. Littlejohn*, treasurer, 195 Ala. 614; 71 So. 488.

This office would hesitate to declare invalid a law or an evidence of indebtedness upon the faith of which bona fide investments have been made, unless the invalidity is absolutely unquestionable. Even if the debt was evidenced by contract which the court of county commissioners had no authority to make, having had power to borrow money and secured money on such contract, the contract though not binding as a security or bond might still be valid as a voucher for the amount received under it, open, however, to all defenses into whosoever hands it may come. *Dillon on Municipal Corporations*. (5th Edition) Vol. 1, p. 528, section 283.

Very truly yours,

HARWELL G. DAVIS,
Assistant Attorney General

REGISTRATION AND ELECTIONS:—Under 1919 Act time for registration may be extended after January 5th if necessary. Registrars in smaller county may not receive supplement to the per diem allowed by law.

December 20, 1919.

State Board of Registrars,
Capitol.

Dear Sirs:

Complying with your request for construction of the amendment to the registration of electors act, approved September 25, 1919 (Acts 1919, p. 687), I beg to advise that under that amendment, where the registration has not been completed in any county by the 5th of January in any year, the time for registration may be extended for a longer period, provided the Commissioners' Court, or court of like authority, enter an order upon the minutes of the court that they deem it necessary for the purpose of registration for the board to sit at the court house at the county site on such additional days as the court may designate. Provided, that the time consumed in completing the registration shall not exceed sixty days in counties of less than fifty thousand population, and thirty days in counties of more than fifty thousand population. I am unable to see why less time is given in the larger counties than in the smaller counties, but the act so reads.

The registrars, however, may not be authorized to sit within sixty days preceding any primary or general election.

The registrars are to be paid by the State three dollars for each day's attendance upon the sessions of the board.

Where registrars have not given the required notice and visited each precinct in the county, or are for any reason unable to visit every precinct in the county between November 15th and January 5th, then they should visit as many of the precincts as possible within that time, and also sit at the court house at the county site from January 1st to January 5th, giving such notice as time permits, and then if the voters have not been given a sufficient opportunity to register, application should be made to the Commissioners' Court, or other body of like jurisdiction, for an order permitting them to sit at the county site and complete the registration. For the supplemental registration the amendment provides that the registrar shall give notice by

publication once a week for three successive weeks in a newspaper. And where there is a branch court house or county seat, the Commissioners' Court, or any body of like jurisdiction, may require the registrars to sit not exceeding five days in January at such branch court house.

Special provisions, not necessary here to go into, are made for counties having more than eighty thousand population.

The impression has become prevalent that, because in counties of more than eighty thousand the act provides that the county may supplement the salary of the registrar, the per diem of the registrars in the smaller counties may also be supplemented by the county. There is, however, no foundation for this idea that has gotten abroad. In counties under eighty thousand population, the registrars can receive only three dollars a day for each day's attendance upon the session of the board.

The fact that there is not time to give the necessary notice should not prevent the registrars from giving such notice as they can, and proceeding to register on the days appointed.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

COUNTY DEBT; COUNTY COMMISSIONERS:—Anticipating taxes for current year to meet current expenses is not creating additional indebtedness.

December 23, 1919.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

I beg to reply to your request for an opinion on the following question:

“When a county has contracted obligations up to or in excess of the limit of indebtedness imposed by the Constitution, can it, through its Court of County Commissioners or other governing body, anticipate its taxes in the form and for the purpose prescribed by the Act approved Mar. 1, 1915, Acts 1915, page 105?”

In the case of *Brown, Treasurer v. Gay-Padgett Hdw Co.*, 188 Ala. 423, 427, Mr. Justice Somerville, in discussing the meaning of the word "indebtedness," as used in section 224 of the Constitution of 1901, said:

"In short, the indebtedness intended is the obligation to pay more money than can be supplied by current funds, or by current revenues provided by lawful taxation for the fiscal year."

In this ably considered opinion the following conclusion was stated:

"As a result of the foregoing considerations, we hold that a county which is indebted up to the constitutional limit may nevertheless appropriate its anticipated revenues actually assessed for the payment of its ordinary current obligations incurred during and for the year for which such revenues are assessed and payable; that the obligations absolutely fixed by law are preferred claims; and that all voluntary obligations, assumed or incurred after the exhaustion of the full amount of revenues on hand or in valid expectancy are debts which are repugnant to the Constitution, and are therefore invalid as to their payment.

"We think it is clear, also, that such a county cannot *borrow money* even to provide funds for current and necessary municipal expenses."

At the time this opinion was written, there was no general law expressly authorizing counties to borrow money, and it had been unanimously held that without such express authority a county could not borrow money for any purpose.

Gunter v. Hackworth, 182 Ala. 205.

Mayor of Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611.

Undoubtedly the last sentence in the conclusion of the opinion quoted *supra* meant that under the law as it existed at the time of the rendering of the opinion a county had no authority to borrow money for any purpose. It cannot be questioned that the Legislature could delegate such a power

to a county, and that the power when delegated could be used to the extent authorized by the Legislature, and so long as it did not contravene constitutional limits.

By an act approved March 1, 1915, the county, through its Court of County Commissioners, was authorized to make certain loans in anticipation of the taxes for the current year during which the loan was made (Acts 1915, page 105).

Inasmuch as it has been held by our Supreme Court that the anticipation of the taxes of a current year by a county was not creating an indebtedness prohibited by section 224 of the Constitution, and inasmuch as counties have been expressly authorized to make loans in anticipation of the taxes of the current year during which such loans are made, I am of the opinion that counties that have reached their debt limit under section 224 of the Constitution may make valid loans in anticipation of the taxes of the current year during which said loan is made, under the authority given in the act approved March 1, 1915 (Acts 1915, page 105).

The opinion previously rendered by this office relating to this subject is modified so as to conform to this view.

Yours very truly,

HARWELL G. DAVIS,
Assistant Attorney General.

COSTS AND FEES; OFFICE HOLDERS:—Change in method of fixing fees for making transcripts is not increasing compensation during term of office. Providing a fee for a service does not violate section 281 of Constitution. Fee for collecting money on judgments applies on all judgments unpaid at date of approval of act.

December 23, 1919.

Hon. Wm. J. Waldrop,
Clerk of Circuit Court,
Birmingham, Ala.

Dear Sir:

I am in receipt of copy of your letter of November 11, which recently reached the office, the original of the letter not having been received.

You referred to House Bill No. 186 (Acts 1919, p. 884), amending section 3713 of the Code. You evidently mean

Senate Bill No. 186 amending section 3713 of the Code. The act referred to makes no change in section 3713 of the Code except that it leaves out the last item in said section and inserts a provision for the collection of fees for preparing transcript to the Supreme Court, and for the collection of money on judgments. You ask whether or not these increased fees allowed by the act are effective during the terms of the present incumbents. The law formerly provided for a charge of 10 cents per hundred words for the original, 5 cents per hundred for the copy furnished the appellee, and \$2.50 for the copy of the transcript to the Supreme Court required to be kept on file in the office of the clerk. The law as changed by the act of September 30, provides for a charge of 15 cents for each hundred words for the original and 5 cents per hundred words for each copy. As the law formerly stood the clerk collected 10 cents per hundred words for the original and 5 cents per hundred for a copy for the appellee and a flat rate of \$2.50 in each case for the copy required to be filed in the clerk's office. The only change therefore in the law is that the clerk is now allowed five cents for each one hundred words for a copy of the transcript kept in his office instead of a flat rate of \$2.50 for such copy in each case. I am of the opinion that the Legislature had the authority to provide for a uniform charge of 5 cents for each one hundred words for the transcript kept in the clerk's office instead of a flat rate of \$2.50 in each case without violating section 281 of the Constitution of Alabama.

With reference to the provision for the collection of money on judgments which is the last item in the act referred to, the Supreme Court of Alabama held in the case of *State ex rel Brandon v. Prince*, 74 So. 939, that the Constitution of Alabama which prohibits the increasing or decreasing of the compensation of an officer during his term of office does not apply to new duties assigned to such officer, and that the Legislature has authority to compensate for such additional duties. As I understand it, the clerk has heretofore performed the service of collecting money on judgments, but no compensation was allowed him for the service. In other words, there was no fee for the service and I am of the opinion that the Act of the Legislature in providing for fee for this service did not increase a fee within the meaning of section 281 of the Constitution of

Alabama. If there were no fee for the service, the act of the Legislature in providing for a fee would not, in my opinion, be the increasing of a fee for the service.

You inquire whether in my opinion the fee for collecting money on judgments applies to judgments rendered prior to September 30, 1919, but not collected at that time, or whether the Act applies to judgments obtained subsequently to the approval of the Act. The Supreme Court held in the case of *Coker v. Fountain*, 75 So. 471, that although the law required the appeal to be taken within twelve months from the time the judgment was obtained, if no appeal had been actually taken, that a new law requiring appeals to be taken within six months applied to the judgment. By analogy, in my opinion, the Act of September 30, 1919, applies to judgments even though obtained prior to that date, if such judgments were unpaid at the time the act was approved.

The language in the Act referred to "for each hundred words 5 cents .15" evidently means for each hundred words 5 cents .05. This was evidently a typographical error in the bill as originally introduced.

I am of the opinion that the Act of 1915, page 337, providing for a charge of \$2.50 for copy of the transcript to be kept in the office of the clerk is superseded by the Act of 1919, which provides for a charge of 5 cents per hundred words for all copies of the transcript.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

COUNTY COURTS; CIRCUIT CLERKS:—Circuit Clerk is authorized to collect fines and costs in county court except when execution issued and turned over to sheriff.

Hon. B. T. Roberts,
Judge of Probate,
Clayton, Alabama.

December 29, 1919.

Dear Sir:

Your letter of the 26th instant, with reference to the collection of fines and costs, has been received.

By the provisions of an act passed at the last session of the Legislature (Acts 1919, p. 200), clerks of the Circuit Courts are made ex-officio clerks of the County Courts.

Section 3271 of the Code, sub-section 3, provides that the clerk of the Circuit Court has authority to receive the amount of any judgment rendered in the courts of which he is clerk, either before or after the issue of execution thereon.

I am therefore of the opinion that it is the duty of the clerk of the Circuit Court to collect fines and costs, except in cases where execution is issued and same is turned over to the sheriff for collection.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

STATE BONDS; ACCOUNTING:—State is authorized to use any funds in the treasury for payment of bonds maturing January 1, 1920, or may issue refunding bonds as provided by Act of February 17, 1919.

December 30, 1919.

Hon. R. L. Bradley,
State Treasurer,
Capitol.

Dear Sir:

In reply to your inquiry with reference to the outstanding bonds of the State of \$954,000, maturing on January 1, 1920, I beg to advise:

These bonds are a binding obligation of the State for the payment of which the faith and credit of the State are pledged. The authority to contract the debt by the issuance of the bonds carried with it the power to levy sufficient taxes to meet the obligation at maturity, and contemplated the payment of the bonds at maturity out of funds on hand so collected, without any further action to be taken to make the funds in the Treasury available, subject to the right of the State to make any arrangement which it might see fit for extending or renewing the obligation in whole or in part.

The Legislature of 1919, by an act approved February 17th, found on page 120 of the Acts of 1919, authorized the Governor to refund the issue of bonds in question either by exchanging new bonds for old bonds, of course with the

consent of the holders of the old bonds, or by issuing new bonds in a sufficient amount to take up the old bonds. But it does not appear to have been the purpose and intention of the Legislature to prohibit the State from paying all or any part of said bonds from available funds in the Treasury, but was only intended to supply an alternative method of meeting the obligation in the event and to the extent that funds in the Treasury raised by taxation were not available.

So that I am of the opinion that the State is authorized to use any funds in the Treasury, in the opinion of the Governor available, for the payment of said bonds, in whole or in part, and to issue refunding bonds only to the extent that is necessary in order to complete the retirement of the old issue of bonds outstanding, and that the pledge of the faith and credit of the State to pay the outstanding bonds at maturity takes away any need of any further appropriation by the Legislature of the money necessary to retire the bonds than that implied by the authority to issue the bonds.

Yours very truly,

L. E. BROWN,
Assistant Attorney General.

BLUE SKY LAW; SECURITIES COMMISSION:—Expense of appraisal is to be paid by promoters making application to Commission.

December 30, 1919.

Hon. Wm. C. Oates, Executive Officer,
State Securities Commission,
Montgomery, Alabama.

Dear Sir:

This office is in receipt of your letter of the 26th instant.

As I construe the provisions of the Blue Sky Law (Acts 1919, p. 946), the answers to the inquiries contained in your letter are as follows:

1. Under the provisions of section 15 of the act, you are entitled to collect a salary of "not to exceed" two thousand dollars per annum, and expenses incurred by you while on duty.

2. Under the provisions of section 5 of the act, the Superintendent of Banks is under the duty to examine certain

statements, and if he deem it advisable, to make a detailed inspection at the promoters' expense, and an appraisal may also be made by the Superintendent of Banks in person or by assistant appraiser. If the inspection and appraisal shall be made by the Superintendent of Banks or an assistant appraiser, the expenses of the trip may be charged to the promoter, and should be paid into the Treasury, under the provisions of section 15, which provides that all fees provided for in the act shall be collected by the Superintendent of Banks and be turned in to the State Treasury. An expense account can then be made out in favor of the party who makes such inspection and appraisal, in the usual manner.

3. Under the provisions of section 5 of the act, the Superintendent of Banks, in case he or one of the assistant appraisers does not make the appraisal, has authority to appoint not to exceed three appraisers, and such appraisers shall receive as compensation for their services a sum not to exceed fifteen dollars per day and expenses incurred, which compensation and expenses shall be paid by the persons, company, partnership, or association making application to such Securities Commission.

In this instance, it does not seem to me to be necessary that the money so collected shall be turned over to the Treasury, and payments of such fifteen dollars per day and expenses made through the Auditor's office. The per diem and expenses may be collected from the party liable and paid to such appraiser or appraisers, not to exceed three, direct. Or, if preferred, the per diem and expenses of the appraisers may be paid through the Auditor's office, and the parties liable for the amount thereof billed for same, and when collected it may be turned over to the State Treasurer.

I think the purpose of this provision for not to exceed three appraisers is to enable the Securities Commission to secure the services of some person or persons who are experts in the particular line involved in the appraisal.

Yours truly,

LAMAR FIELD,
Assistant Attorney General.

TAXATION; MOTOR FUEL INSPECTION LAW:—Dealers are liable for payment of tax on gasoline sold before tags were supplied. Tags when supplied must be destroyed to the amount of the goods already consumed.

December 31, 1919.

Mr. R. B. Janney, Chemist,
State Highway Department.
Capitol.

Dear Sir:

In reply to your inquiry of December 30, in regard to gasoline inspection tax (Acts 1919, p. 996), I beg to advise that all persons, firms, associations, or corporations liable for the payment of this tax are just as liable for the tax from November 29, to the time when it became practicable for you to furnish them with tags as they are since the tags have been available.

Where there is no intention to violate the law, the purposes intended to be accomplished by the act will be met by allowing dealers in gasoline and other articles covered by the inspection act now to purchase tags to be placed on all goods subject to the tax. Where tags are purchased for goods already consumed, it should be seen to that they are canceled and destroyed.

Yours very truly,
J. Q. SMITH,
Attorney General.

PROHIBITION LAWS:—\$50 reward cannot be included in bill of costs provided for by sections 6572-6575 of Code; is taxed against defendant and may be paid from convict fund; is available to discharge obligations already incurred.

January 2, 1920.

Hon. C. B. Rogers, President
Board of Convict Inspectors,
Capitol.

Dear Sir:

Replying to your letter of December 2, 1919, we beg to advise on the following inquiry:

Is the fee or reward of \$50.00 provided for by section 16 of the prohibition bill approved Jan. 25, 1919,

taxed against the defendant; and is it an item which should be included in the bill of costs authorized by sections 6572 and 6575, Code of 1907? Is the provision of the bill approved September 29, 1919, providing for the payment of such fee, retroactive?

In reaching the proper interpretation of the statute we may consider its contemporary history, the prior condition of the law (State ex rel. City of Birmingham v. Board of Revenue of Jefferson County, 78 South, 964), its practical effect, and all laws *in pari materia* (R. R. Commission v. Alabama Great Southern, 185 Ala. 355). The Attorney General's opinion will be given weight as a factor in the interpretation of statutes of doubtful meaning.—Shepherd v. Sartain, 185 Ala. 441.

Section 10 of the prohibition act approved January 25, 1919 (Acts 1919, p. 11), provides that "there shall be charged in the bill of costs to be paid and collected as other items of costs, the sum of \$50.00 to be allowed the sheriff or other officer or person who furnished the evidence and brought about the conviction."

By the express and unequivocal terms of this section the fee or reward allowed is taxed as cost against the defendant on conviction. It does not necessarily follow that it is to be included in the bill of cost provided for by sections 6572 and 6575 of the Code of 1907, for there are many items of cost taxed against a defendant that are not included in the bill payable out of the convict fund.

The prohibition law allowing this fee or reward was approved January 25, 1919. On June 29, 1919, the Attorney General advised the Auditor that this fee or reward was not to be included in the bill of cost prepared in compliance with sections 6572-6575 of the Code, and was not payable out of the convict fund because there was no express provision to that effect. On September 29, 1919 (Acts 1919, p. 983), an act was approved providing for the payment of this fee or reward. The act was undoubtedly passed to remedy the defect pointed out by the opinion of the Attorney General by making express provision for its payment, and thus assure the person entitled thereto of its payment regardless of the solvency of the defendant.

This remedial act did not provide for this fee or reward to be included as an item of cost under sections 6572-6575, and whereas the warrant in payment of the cost bill under

these sections is drawn to the clerk, the warrant in payment of this reward is drawn payable to the party entitled thereto.

In view of these considerations, I am of the opinion that this fee or reward cannot be legally included in the bill of cost provided for by section 6575 of the Code, and therefore is not to be estimated as a part of the total amount of such bill of cost limited by section 6573 to \$150.00.

The act approved September 25, 1919, makes the fee or reward payable out of the convict fund to the person entitled thereto, where the defendant is sentenced to the penitentiary, depend only on two prerequisites, the certificate of the presiding judge that the claimant is entitled to same, and a certificate of the President of the Board of Convict Inspectors that the defendant in whose case said sum is payable has actually begun to work out the sentence imposed on him. Upon the presentation of such certificates to the State Auditor, he is required to draw a warrant on the convict fund in payment of such fee or reward.

This is not a retroactive law, subject to the rule of strict construction. It is remedial, seeking to provide means for the payment of obligations already incurred. Such statutes are liberally construed to effect the purpose for which they were intended. Section 2 of the act approved September 29, 1919, provides that "all sums now due and payable by virtue of the provisions of the prohibition laws of this State shall be paid in the way and manner herein provided for." The act was clearly intended to enable those who had claims of this character due and unpaid at the time of the approval of the act to collect same, and should be so construed. *Ex parte Buckley*, 53 Ala. 42; *Enslin v. Wheeler*, 98 Ala. 200.

The conclusions reached are as follows:

The fee or reward is taxed as cost against the defendant upon conviction. It is not included in the bill of cost provided for by sections 6572-6575, which is limited to \$150.00. The fee or reward is payable to persons allowed the same prior to, as well as those allowed it subsequent to, the approval of the act of September 29, 1919.

Yours very truly,

J. Q. SMITH,
Attorney General.

LEGISLATION:—Sheriff's feed bill Act of 1919 invalid because of absence of enacting clause.

January 2, 1920.

Dr. Glenn Andrews,
State Prison Inspector,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of January 2d, in which you ask to be advised whether or not H. B. 726, an act to regulate the feeding of prisoners in county jails, passed by the Legislature of 1919 (Acts 1919, p. 1074), is valid or invalid, owing to the failure of the Legislature to embrace an enacting clause in said bill.

I have inspected the original bill passed by the Legislature, in the office of the Secretary of State, and I find that it does not contain the enacting clause, as provided in Section 45 of the Constitution of Alabama of 1901, which provides and requires that the style of the laws of this state shall be: "Be it enacted by the Legislature of Alabama." This is commonly called the *enacting clause*.

I am of the opinion, and so advise, that owing to the fact that this bill does not contain the enacting clause as provided in section 45 of the Constitution, it is void.

I am clearly of the opinion that section 45 of the Constitution is mandatory. There are many cases, from all jurisdictions in the United States, upholding this contention, and I have no doubt that our Supreme Court will take this view.

Very truly,
J. Q. SMITH,
Attorney General.

BLUE SKY LAW:—Building and loan associations not within provisions of Act of 1919.

January 3, 1920.

Hon. William C. Oates,
Executive Officer,
State Securities Commission,
Montgomery, Ala.

Dear Sir:

I acknowledge receipt of your letter of the 2d instant.

I think it clear, for the reason hereinafter stated, that it was not the intention or purpose of the author of the bill or of the Legislature to include within the provisions of the act, building and loan associations. Section 9 of the Blue Sky Law (Acts 1919, p. 953), is based on section 9465 of the laws of the State of Kansas appearing in the United States Annotated Blue Sky Laws by Elliot, page 253. It will be observed that subsection (a) of section 9 is an exact copy of subsection (a) of the Kansas law referred to. It will also be noted that subsection (b) of the Blue Sky Law reads "public or quasi-public corporations," while the Kansas law adds the following, "the issues of which are regulated by the Public Utilities Commission of the State of Kansas, or by the public service commission or board of similar authority of any state or territory of the United States; or securities senior thereto."

Subsection (c) of the Blue Sky Law is almost identical with the language of subsection (b) of the Kansas law except that the Kansas law provides that the act shall not apply to building and loan associations "authorized by the Charter Board to do business in this state."

It appears that the charters of all corporations are issued by a Charter Board in the State of Kansas, while under the Alabama law building and loan associations are incorporated by the filing of a declaration in the office of the probate judge. It therefore appears to me to be evident that it was the purpose of the author of the bill who was following the Kansas law to make subsection (c) read so as to cover the meaning of the clause reading as follows: "State or national banks or trust companies, mortgage companies dealing exclusively in bona fide mortgages on farm and city real estate or building and loan associations *authorized by the laws of the State of Alabama to do business in this State.*"

The whole purpose of the Blue Sky Law is to authorize the doing of business in Alabama, and if building and loan associations are not to be permitted to do business in the State except when "authorized by the State Securities Commission to do business in this State," the provision of section 9 to the effect that the provisions of the act shall not apply to building and loan association, etc., would be meaningless, and there would have been no occasion for un-

dertaking to except building and loan associations from the provisions of the act.

I am therefore of the opinion, as stated above, and for the reasons herein stated that the Blue Sky Law does not include within its operation building and loan associations.

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

OFFICE HOLDERS:—Appointee filling vacancy serves only part of term, and cannot profit by increase in salary authorized during earlier part of term.

January 5, 1920.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

In your letter of December 19, 1919, you request to be advised whether an officer elected or appointed to fill a vacancy for an unexpired portion of a term in a civil office of profit under a county of this State is entitled to draw an increase in pay made during the portion of said term served by his predecessor.

The answer to this question depends on whether the inhibition of section 281 of the Constitution of 1901 against increase of salary or compensation applies only to the incumbent at the time the increase is made, or applies to the official term, thereby affecting all persons holding during this definitely fixed period. Section 281 reads as follows:

“The salary, fees or compensation of any officer holding any civil office of profit under this State or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed.”

In the case of *Bosworth v. Ellison*, 147 S. W. Reporter 400, the Court of Appeals of Kentucky in construing a constitutional provision almost identical in wording with the one under consideration said:

“Ellison was appointed to fill out a part of Morgan’s unexpired term. He had no term of office apart from

the term of Morgan. He was merely occupying the place that Morgan, under his election, would have filled, except for his resignation. A term of office, when the period of the term is fixed by Constitution or statute, means the period designated by the Constitution or statute. There should be a certainty and a fixedness about the words 'his term of office.' They were not intended to depend on the mere accident of appointment or election to fill a vacancy for a month or a year. When a person is appointed or elected to fill a vacancy in a term, he merely fills out the term of his predecessor. He does not enter on a new term of office, as does a person who is elected or appointed and takes the office at the beginning of the term as fixed by law. Within the meaning of section 161 of the Constitution, Ellison occupied precisely the same position that Morgan would, if he had not resigned. *Larrew v. Newman*, 81 Cal. 588, 23 Pac. 227; *Storke v. Goux*, 129 Cal. 526, 62 Pac. 68."

The intention of such a provision has been held by the Supreme Court of Illinois to be to unalterably fix for the official term of the office the compensation, and that the inhibition against a change of salaries refers to such official term, and not to the individual who happens to hold the office at the time the raise is made.

Foremen v. The People, 209 Ill. 567; 71 N. W. 35;
Collom v. Dolloff, 94 Ill. 330.

Section 281 of the Constitution, *supra*, prohibits an increase during the term for which the officer is elected or appointed. The term of the party filling the vacancy for the unexpired portion for which he was elected or appointed is the same term as that of his predecessor whose place he took. The increase being made during this term the person filling such vacancy could not receive the extra compensation.

Troop on Public Officers, Sec. 467, p. 446;
29 Cyc., p. 1428, sec. 3.

It is my opinion that the best reasoned authorities hold that the inhibition runs for the fixed period of the official

term, and is not simply a personal inhibition solely against the incumbent at the time of the raise.

Very truly yours,

J. Q. SMITH,
Attorney General.

STATE BONDS:—At death of holder new bonds should be issued only to executor or administrator.

January 5, 1920.

Hon. R. L. Bradley,
State Treasurer,
Montgomery, Ala.

Dear Sir:

I am in receipt of your letter of the 26th inst. Papers forwarded with your letter are herewith returned.

Unless the widow of John Lester Stallworth and the two children referred to are the only heirs of deceased, and the estate of deceased was free from debt, the cancellation of the attached bond and checks and the issuance of another bond and other checks in favor of the widow, individually and as guardian of the two children, would not protect the State of Alabama. It is doubtless true, as stated in the attached affidavits, that these three parties are the only heirs and that there are no claims against the estate, but I do not think it would be safe to so assume and issue a new bond and checks in lieu of those held by deceased except to a legally qualified administrator, who shall deliver to you a certified copy of letters of administration. If a new bond and checks should be issued to the widow individually and as guardian, and an administrator should be later appointed, the State would have to show in order to protect itself as against the administrator, that the three parties referred to are the only heirs and that there were no debts against the estate. If, on the other hand, an administrator should be appointed and new bond and checks should be issued to such administrator no question could be raised against the State.

Under the provisions of sections 2589 and 2590, if an administrator is appointed, all claims not presented within a certain time therein named, are forever barred, but not so in cases where no administrator is appointed as in this case.

There may be debts which have not yet matured and of which the widow has no knowledge.

Under the provisions of section 2579 of the Code, it is made the duty of an executor or administrator to collect and take into his possession all property of a decedent except such as may be exempt from administration under the statute, and if the State should deliver the bond and checks to any other person, the State would not be protected as against such administrator, without further liability against it without assuming the burden of showing that the widow and two children are the only heirs and the estate is free from debt or that the bond and checks are exempt to the three heirs named. So, as above stated, I am of the opinion that the only safe course for you to follow is to deal with an administrator who shall produce to you, for your records, a certified copy of letters of administration.

Yours very truly,

J. Q. SMITH;
Attorney General.

SCHOOL SYSTEM; OFFICE HOLDERS:—Mayor not eligible to serve on city board of education. City board not permitted to relinquish its duties to county board.

January 6, 1920.

Hon. Spright Dowell,
State Superintendent of Education,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of January 5, requesting my opinion as to certain provisions of the new educational code, and will reply to the inquiries in the order in which they occur.

1. Section 2 of Article 8, to which you refer (Acts 1919, p. 595), provides that members of the city board of education "shall not be members of the city council or commission." In cities or towns having the commission form of government, the mayor is a member of the commission and is therefore ineligible to serve as a member of the city board of education. In towns having a mayor and board

of aldermen, the mayor is a member of the council and is also ineligible to serve on the city board of education.

2. Section 1 of Article 8 provides that a town having a population of between 1,000 and 2,000 which is levying a three-mill tax "shall have the power through its council or other governing body to select by a majority vote of its entire membership, and *in accordance with the plans set out in section 2 of this article*, a board of education," etc.

* * * "provided further, that *until such time as the town council or other governing body shall elect a board of education in accordance with the provisions of this section, said town shall remain under the control of the county board of education.*"

Section 2 referred to provides the manner in which members of such board shall be selected, and contains the following provision:

"In the event of a vacancy in the membership of the city board of education by resignation or otherwise
* * * the said council or commission *shall* elect a person to fill such vacancy."

In view of the fact that there is an affirmative provision to the effect that until such time as the town council or other governing body shall elect a board of education the town shall remain under the county board, and contains no provision authorizing a city which has placed its school affairs under a city board to relinquish that right and turn the administration of the schools back to the county board, I am of the opinion that such relinquishments of authority cannot legally be made. The Legislature may have entertained the view that to permit changes from an administration by a city board back to the county board with the right under the statute to change back to the city board, would result in confusion and uncertainty, and authorize a city board which might not properly administer the school affairs to turn their troubles back over to the county. Regardless of whether the Legislature considered this question, it appears to me to be one to be considered.

It is also to be noted that it is provided that in the event a vacancy on such city board should occur, the council or commission *shall* elect a successor. But for this provision, there might be ground for the opinion that all members of such city board might resign and automatically return the administration of the schools to the county board.

I have reached the conclusion that when the commission or council of such a town has once elected to place the administration of its school affairs under a city board of education, no right exists under the law for turning back the administration of such school affairs to the county board.

Very truly,
J. Q. SMITH,
Attorney General.

SENTENCES; FINES AND COSTS:—Sentence to hard labor in lieu of fine is merely an alternative to enforce payment and convict may be released on payment of entire fine.

January 6, 1920.

Hon. C. B. Rogers,
President Board of Convict Inspectors,
Capitol.

Dear Sir:

You request to be advised whether the law permits the payment of a fine after a sentence therefor has been imposed.

Sections 7634 and 7635 of the Criminal Code regulate the sentencing of a defendant for fine and cost, in the event it is not paid or judgment confessed therefor.

Section 7635, relating to cost, provides that, "such convict must be discharged from sentence against him for cost on the payment thereof, or any balance due thereon, by the hire of such convict, or otherwise."

Section 7634, relating to sentencing for the payment of the fine, contains no provision for release of the convict upon the payment of the fine after sentence therefor has been imposed.

In view of the express provision for release upon the payment of the cost in section 7635, does this silence of section 7634, preclude the intention to permit the payment of a fine after sentence therefor? It would strongly indicate such purpose on the part of the law-makers if both of these sections were part of one statute and there was no obvious reason why such specific provision should be contained in one section and not in the other. But these two sections were not part of the same statute, nor were they enacted by the same Legislature. Section 7635 was a supplemental

act to Section 7634, and while they are to be construed to harmonize with one another, it has been held that it would be too strict a construction to interpret one by reference to the other, "with as much critical severity as if they were sections of a single ordinary statute."

Williams v. State, 55 Ala. 166.

To the writer, the obvious reason for including the special provision in section 7635 relative to discharge was to give the defendant the right to receive credit for the amount realized from his hire while working out the cost. In making the cost an item to be considered in determining the duration of the sentence, which was formerly determined solely by the amount of the fine, the benefit of the service rendered in payment thereof was given the defendant, which is not the case with the fine. To effect this, the sentence for the cost is at a certain rate per day, that the defendant's credit might be definitely determined. The sentence for the fine is different. Sections 7634 and 7635 Criminal Code.

The defendant is given the further advantage of having the time for which he can be sentenced for cost limited to ten months. That such sentence for cost does not supersede the judgment for the cost to the extent of giving it no further effect on defendant's status is shown by the holding of our court that a defendant cannot be discharged from the sentence for cost by paying merely the amount he would earn during the time for which he was sentenced, but to effect such discharge he is required to pay the entire amount of such cost.

Ex parte State, In Re Pierce, 89 Ala. 177.

Even criminal statutes are to be construed so as to effect their purpose, even if it is necessary in so doing to sacrifice the cold letter of the law. Under the common law a defendant was ordered "to stand committed to jail until the fine was paid" (Bishop on Criminal Procedure, Vol. 1, Sec. 1301), and he was released on the payment thereof. Our statutes are merely enlargements of this common law rule. The sentence is the only practical alternative where the fine is not paid or judgment confessed therefor. It is simply to enforce payment by compulsory methods.

Ex parte Joice & Smith, 88 Ala. 128.

In the case of Ryan, Treasurer v. Collins, 196 Ala. 478, 71 South. 690, it was held that fines paid after defendants had been sentenced to hard labor therefor went to the fine and forfeiture fund, even though a local act provided that sentences to hard labor were on the county's public roads. The question under consideration here was not raised in that case, but it is worthy of note that all courts proceeded on the assumption that the payment was legally made.

The conclusion is that the sentence to imprisonment or hard labor when the fine is not paid, or judgment confessed therefor, is merely an alternative to enforce payment, and that upon the payment of the entire fine the convict is entitled to be released from the sentence therefor.

Yours very truly,

J. Q. SMITH,
Attorney General.

TAXATION:—Exemption of property of charitable institutions not partial or pro rata. "Exclusive use" does not preclude charging small fees. Non-charitable fraternal organizations not exempt from taxation. Property owned by charitable organizations but used for commercial purposes not exempt.

January 9, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Replying to your communication of January 6th, I beg to advise as follows:

1. That property of charitable or fraternal organizations subject to tax under the law of 1915 (Acts 1915, page 386), because such property is not used exclusively for charitable or fraternal purposes, is not partly exempt to the extent it is used for charitable or fraternal purposes. Such property is either entirely exempt or entirely subject to taxation. Exemption statutes are strictly construed against exemptions, and there is no provision in the law providing for assessing such property on a basis of apportionment of the value to its several uses.

Anniston City Land Co. v. State, 185 Ala. 482, 64 South. 110.

2. The law of 1915 exempts the property of fraternal and charitable institutions, when used exclusively for that purpose. Property of such organizations is not exempt simply because it is owned by them, but it must have the characteristic of being exclusively used for their purposes. Ownership does not enter into the test as to whether or not it is exempt.

It becomes necessary for us to determine what is meant by the term "exclusively used." In construing a similarly worded statute, our court held that "exclusively used" meant that the entire property was primarily and inherently devoted to such purpose, and that an incidental use of such property for other purposes which did not interrupt its exclusive use for charitable or fraternal purposes, but proximately contributed in promoting it, did not defeat the exemption.

Anniston City Land Co. v. State, 185 Ala. 482, 64 South. 110.

It has been held in other states that the Y. M. C. A., depending largely for support on public donations, and being in no way operated for private gain, but devoted to the improvement of the spiritual, mental, social and physical welfare of men, is a charitable institution, and its exemption from taxation, as such, is not waived because it charges a small fee for certain services, the fee not being for profit, but to further its purposes.

Little v. City of Newburyport, 210 Mass. 414.

By the application of these principles to the specific facts of each case, you can determine whether the use of the fraternal property for other purposes is such as will subject it to taxation under the law of 1915.

You inquire whether the use of fraternal property for social purposes would defeat its exemption. It is difficult to conceive how an organization could be fraternal without promoting companionship and friendliness among its members, and one of the chief means of accomplishing this is by providing for their social intercourse. When the property is used for such purpose, its exemption is not defeated. However, if a part of such property is so commercialized as to make the use of that part primarily for profit, the exemp-

tion would be defeated, whether this use was for social or other purposes.

3. The property of merely fraternal organizations is not exempted under the law of 1919, the word "fraternal" having been omitted from the exemption section of that act (Acts 1919, page 282). This provision does not necessarily subject the property of every fraternal organization to taxation, as many such organizations are *charitable* organizations, within the meaning of that word as used in the exemption section of the act of 1919, *supra*, and of section 91 of the Constitution of 1901, which deprives the Legislature of the power to tax property exclusively used for purely charitable purposes.

4. Whether or not a particular organization is charitable depends upon the facts in each particular case. The test is, what is the purpose of the organization? If its purpose is for gain, it is not charitable.

. Long v. Rosedale Cemetery, 84 Fed. 135.

When an institution is operated without a view of profit, and the sole purpose and object with which it acquires money and property beyond current expenses are for the bestowal of reliefs and charities, it is a charitable institution, within the meaning of the law.

Burdine v. Grand Lodge of Alabama, 37 Ala. 432.

Hennepin County Brotherhood, 27 Minn. 460.

Anniston City Land Co. v. State, 160 Ala. 253; 48 So. 659.

Anniston City Land Co. v. State, 185 Ala. 482; 64 So. 110.

5. As to the specific cases about which you inquire—the Masons, Knights of Pythias, and Y. M. C. A.—I beg to advise that our Supreme Court has held that it will take judicial notice that the Masonic Lodge is a charitable institution (Burdine's case, *supra*). It necessarily follows that property used exclusively for Masonic purposes is exempt.

I am of the opinion that by applying the above definition of a charitable institution, you will find that the other organizations about which you specifically inquire are exempt, under the law of 1915.

6. The law of 1919, after exempting property required by section 91 of the Constitution, the wording of which exemption section was simply a rescript of that section, further provides that:

"Property, real or personal, owned by an educational, religious, or charitable institution, society, or corporation, let for rent or for hire, or used for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious, or charitable purposes." (Acts 1919, page 283).

But does this provision operate to defeat the exemption of property used exclusively for purely charitable purposes where the property is also used for other incidental purposes for which a charge is made, even though such incidental use does not interfere with the exclusive use of the property for its charitable purposes? While a legislative construction will not be condemned unless it is clearly wrong, yet constitutional mandates cannot be either contracted or expanded by that means.

Ex parte Selma & Gulf R. R. Co., 45 Ala. 696.

Board of Revenue of Jefferson County v. State ex rel. City of Birmingham, 172 Ala. 138, 54 South. 757.

Our Supreme Court is the final arbiter as to what the Constitution means. That tribunal held, in the Anniston City Land Company case, *supra*, that the exemption accorded under section 91 of the Constitution, which section is self-executing, is not defeated by an incidental use of such property which does not interfere with the exclusive use for charitable purposes, but tends to promote its main object. The exemption to this extent being accorded by the Constitution of the State, it cannot be abridged by legislative enactments. We are compelled to construe this provision so that it will not infringe upon this constitutional provision, and hold that it applies only to those uses which are not incidental to the main purpose, and which interfere with the exclusive use for charitable purposes. It prevents property *owned* by such organizations from escaping

taxation unless it is used exclusively for charitable purposes.

I am of the opinion that a change in the Constitution is necessary before the Legislature can reach this character of property.

It follows that in determining whether the exemption of such property is defeated under the law of 1919 because it is not exclusively used for charitable purposes, you will apply the same principles stated as a guide under the law of 1915.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

CIRCUIT SOLICITORS:—Deputy solicitor may be appointed for Lee County.

January 9, 1920.

Hon. C. A. L. Samford,
Solicitor,
Opelika, Ala.

Dear Sir:

I am in receipt of your letter of the 8th instant concerning the appointment of a deputy solicitor for Lee County.

Section 4 of the Recircuiting Act, Acts 1919, p. 858, provides that you as solicitor of the Lee Circuit before consolidation shall prosecute in criminal cases in the counties of Lee, etc., and that the solicitor of the 5th Judicial circuit before consolidation shall prosecute criminal cases in the counties of Chambers, Macon, Randolph and Tallapoosa. It therefore seems apparent from this provision that you are given exclusive jurisdiction as solicitor of the circuit in Lee County.

Section 4 of the 1915 Act, page 819, provides that the several circuit solicitors except as otherwise provided by law shall appoint a deputy solicitor in each county of his circuit, etc.

As I view these two statutes you are the solicitor of the Lee Circuit Court under the 1919 Act and it becomes your duty under the 1915 Act to appoint a deputy solicitor.

Very truly yours,
J. Q. SMITH,
Attorney General.

SHERIFFS; COUNTY COURTS:—Fees in county courts taxed under different system do not amount to increase during term of office.

January 10, 1920.

Hon. Charles E. McCall,
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

Referring to your inquiry as to the fees which sheriffs are entitled to collect for services rendered in the County Court in all cases not covered by local acts, I am of the opinion that the act of the Legislature of 1919 (Acts 1919, page 1030), which provides that "the sheriff shall receive the same fees as are allowed by law to him for similar services performed in the Circuit Court, including guard fees where defendants are confined in jail," supersedes the provisions of section 6655 of the Code of 1907 with reference to such fees, it being provided in the act above referred to that all other laws or parts of laws in conflict with the act are expressly repealed.

While it is true that in some cases the fees allowed sheriffs for services performed in the circuit court are somewhat larger than those provided for in section 6655 of the Code, I am of the opinion that this does not amount to an increase of fees during the sheriff's term of office, as he is already allowed such fees for services performed in the circuit court, and the act of 1919 merely amounts to a change in the system of taxing sheriff's fees in county court cases.

Yours very truly,

J. Q. SMITH,
Attorney General.

STATE INSTITUTIONS:—Appropriations for insurance and repairs not being expressly made in later act, amount carried in previous act remains in effect.

January 12, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of January 9th, enclosing a requisition for \$6,000, covering insurance

and repairs for the Alabama School for the Deaf and Blind at Talladega, in which you ask to be advised as to whether or not this amount should be paid under Acts of the Legislature of 1919, page 801.

This Act of the Legislature attempts to amend sections 1941 and 1942 of the Code of Alabama, 1907. You will note by a careful reading of the part of said Act attempting to amend section 1942, that it does not appropriate any sum of money, but simply provides that "the Board of Trustees must provide good and sufficient insurance payable to the State of Alabama upon the property of the State under their control and keep and maintain such property in good repair." .

I find in the Acts of the Legislature of 1911, page 120, an Act to amend section 1942 of the Code of Alabama, which makes an appropriation of \$3,000.00. I am of the opinion and so advise that there being no amount set out in the Act of the Legislature of 1919, page 801, the appropriation of \$3,000.00 provided for by the legislature of 1911 Act, page 120, is now of full force and effect, and that \$3,000.00 per year is the appropriation that should be paid.

Very truly yours,

J. Q. SMITH,
Attorney General.

FIRE MARSHAL:—Chiefs of fire departments or chiefs of police may receive fee for reporting fires to the State Fire Marshal.

January 16, 1920.

Mr. W. J. Williams,
State Fire Marshal,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of January 15, in which you ask to be advised if under section 12 of an act of the Legislature of 1919, approved September 30, 1919, your department is required to pay a fifty-cent fee to the chiefs of paid fire departments in this State for making reports of fires to your office, as required in section 12 of said act.

Under section 4 of said act it is provided that the chiefs of the fire departments, chiefs of police, or marshals, of every incorporated city or town in which a fire department is established, etc., by virtue of such office so held by them, are assistants to the State Fire Marshal, and subject to the duties and obligations imposed by said act, and shall be subject to the direction of the State Fire Marshal in the execution of the provisions thereof.

Section 5 makes it the duty of the assistants to the Fire Marshal as provided in section 4, to investigate the cause, origin, and circumstances of every fire occurring in any city or place in the State by which property has been destroyed, and requiring that every fire that occurs shall be reported in writing to the State Fire Marshal within ten days after the occurrence of the same, by officers designated in section 4 of said act.

Sections 4 and 5 must be considered in connection with section 12 of said act, which provides that all local assistants not receiving a salary from the State of Alabama shall receive monthly, on the order of the State Fire Marshal, fifty cents for each report of each separate fire reported to the Fire Marshal, provided that the loss by such fire exceed the amount of \$25.00.

I am of the opinion, and so advise, that from a careful reading of sections 4 and 5 and section 12 of the Fire Marshal Act, the chiefs of paid fire departments making reports to your office are entitled to fifty cents for each report of each separate fire reported to your office, where the loss by such fire exceeds the amount of \$25.00.

Very truly,
J. Q. SMITH,
Attorney General.

ELECTIONS:—Expenses of special elections on constitutional amendments authorizing road bonds should be paid by the counties.

January 19, 1920.

Hon. F. J. Cramton,
Care Alabama Highway Improvement Association,
Exchange Hotel, City.

Dear Sir:

I beg to acknowledge receipt of your letter of January 16, enclosing a copy of the correspondence with R. S. Shel-

ton, of Scottsboro, relative to the expense of the elections such as that held on December 29, 1919, and the one to be held on February 16, 1920, and you ask to be advised as to whether or not the county or state is liable for such expense.

I beg to advise that the matter is clearly settled by section 284 of the Constitution of 1901, which provides that the election shall be held in all things in accordance with the laws governing general elections.

Section 419 of the Code of Alabama provides that, "The returning officer, the inspectors and clerks, shall each be entitled to two dollars, and the returning officer, in addition, to five cents a mile in going to the court house and returning to the place of holding the election; the several claims to be paid out of the county treasury, on proper proof of the service rendered, to be preferred claims, payable from the money in the treasury not specially otherwise appropriated."

My conclusion is that the pay for the officers holding the election is to be paid by the counties, as provided in section 419 of the Code.

Hoping that this is the information desired, I am,

Very truly,

J. Q. SMITH,
Attorney General.

TAXATION; SCHOOL FUNDS:—Tax Assessor and Collector are entitled to receive allowance provided by section 197 of 1919 Revenue Act, out of collections for year ending September 30, 1919.

January 19, 1920.

Mr. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Replying to your letter of January 6, I beg to advise on the following inquiry: Are the provisions of sections 37 and 197 of the present revenue act, relating to the fees allowed tax assessors on school funds, conflicting? Are the present incumbents of the office of tax assessor entitled to receive any commissions on school funds, and if so, are they entitled to receive such commissions out of taxes assessed during the fiscal year ending September 30, 1919?

The provisions of the two sections relating to the matter under consideration are as follows:

"Section 37. The tax assessor shall, during the current term of the present incumbent of said office, be paid the commissions as now provided by law. * * * He shall also be entitled to receive two per cent on all collections made by the tax collector on special taxes, whether such special taxes be levied for the State or county, to be paid out of such special taxes, except special county and district school taxes on which he shall receive one-half of one per cent."

"Section 197. * * * The tax assessors and tax collectors shall receive such commissions as may be allowed by the commissioners' court, boards of revenue or other governing bodies of the several counties of the State, to be not less than one-half of one per cent, and not more than one per cent each as fees on all school funds assessed and collected by them, to be paid out of such special taxes. The collector may retain his commissions upon collections when he makes payment into the State Treasury."

It is necessary to ascertain whether the term "all school funds," as used in section 197, is limited to special county and district school funds, or include state school funds. Section 197, with the exception of the quoted clause, is a rescript of section 149 of the revenue act of 1915 (Acts 1915, p. 448), and that the Legislature considered that it made no change in the tax collectors' fees is evidenced by the fact that the section was permitted to take effect immediately upon the approval of the act by the Governor, while those sections making a change in fees were postponed in their operation till the expiration of the term of the present incumbents. Such a postponement was contained in section 37, evidently to prevent a violation of constitutional provisions. There would be a change in the fees of both the tax collector and the tax assessor during their term of office, and consequently a violation of the Constitution, if the term "all school funds" is construed to include state school funds, for under the revenue act of 1915 tax assessors and collectors receive two per cent on all state school funds assessed and collected by them. (Acts 1915, p. 401, sec. 27, p. 448, sec. 149).

Furthermore to hold that "all school funds," as used in section 197, included state school funds, would make this provision of section 197 conflict with that clause of section 37 which prescribed that the assessor should receive the same fees as allowed by the revenue act of 1915 during the present term of office. A provision should be given an application which will prevent its nullifying other sections of the same act, and which will uphold its constitutionality. To do this, the quoted part of section 197 must be limited to special county and district school funds. *State ex rel. City of Mobile v. Board, etc. Commissioners*, 180 Ala. 489 61 South. 368; *Lovejoy v. City of Montgomery*, 180 Ala. 473, 61 South. 597.

Certainly, the Legislature did not intend to delegate to the court of county commissioners the authority to fix the fees for collecting a state tax, thereby not only making possible a different fee for the same service in each county, but also involving state officers in unlimited detail work in ascertaining the proper allowance due the tax collector of each county. Courts of county commissioners and like boards are created for county purposes, and operate within the territorial limits of the county. The fact that the county commissioners are permitted to determine the allowance that tax collectors should receive for collecting all school funds is a convincing indication that the provision relates only to special county and district school funds. The meaning of the term as used in the act is gathered from the connection in which it is used and the purpose of the act as a whole. *Brown, Insurance Commissioner, v. Protective Life Insurance Co.*, 188 Ala. 166, 66 South. 47.

By the express provisions of section 37, that section does not become effective until the expiration of the current term of the present incumbent of the office of tax assessor, while section 197 became effective immediately upon the approval by the Governor. Section 197 therefore controls the allowance on special county and district school funds both as to tax assessors and collectors until section 37 becomes operative, and limits its regulation to tax collectors. This construction is in accord with the rule that when practicable and consistent with sound construction every section of a revenue act must be given effect without rendering nugatory any other section, and where one section takes effect at a future date and another immediately, both regu-

lating the same matter, both should be given a field of operation. Brown, Insurance Commissioner v. Protective Life Insurance Co., supra; Weatherford's Admr. v. Weatherford, 8 Porter 171.

As before stated, the present incumbents of the offices of tax assessor and collector receive no compensation under the revenue law of 1915 for assessing and collecting special county and district school funds. They were required to perform his duty by virtue of their office. This duty was an ex officio service. Ex officio services are "those services which the law annexes to a particular office and requires the incumbent to perform without providing specific or precise compensation therefor."

Section 68 of the Constitution of 1901 provides that the inhibition against an increase or decrease of fees during the term of an officer does not apply to an allowance for ex officio service to county officers.

As applicable to the present matter, the following is quoted from the case of Macon County v. Abercrombie, Judge, 184 Ala. 263, 63 South. 985.

"There is nothing in the Act which indicates that the Legislature did not intend that the act should not take effect immediately upon its passage. The passage of the act was a legislative declaration that it regarded the services of the probate judge, with reference to public roads, as ex-officio services, and the judgment of the Legislature on that subject is entitled to great weight. All reasonable intendments of the law are with the validity, and the immediate taking of effect, of acts of the Legislature, and he who assails them has the burden of showing their invalidity for the purposes for which they were enacted. All reasonable doubts must be resolved in favor of the legislative authority to pass and put into immediate effect the law so passed by them."

It is my opinion that section 197 applies to the present incumbents of the offices of tax assessor and collector and that they are entitled to receive the allowance provided for by said section out of the collection of the taxes due or assessments made during the tax year ending September 30, 1919.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

FIRE MARSHAL:—State Fire Marshal not authorized to make arrests. He has no authority to require a water company to put in equipment to increase water pressure.

Hon. W. J. Williams,
State Fire Marshal,
Capitol.

January 20, 1920.

Dear Sir:

The Attorney General's office is in receipt of your letter inquiring whether (1), the Fire Marshal and his deputies have authority to make arrests, and (2), has the Fire Marshal power to demand or suggest betterments in water pressure of public water companies so as to insure better fire protection. You refer to the following provisions which you suggest give your department this authority to-wit:

“Section 2. Be it further enacted, That it shall be the duty of the State Fire Marshal, his deputies and assistants, to enforce the laws and ordinances of the State, and the provisions of this Act, in counties, cities and districts thereof relating to *First*: Prevention of fires. *Second*: Storage, sale and use of combustibles and explosives. *Third*: Installation and maintenance of automatic and other fire alarm systems and fire extinguishing equipment.” (Acts 1919, p. 1013.)

The only passage in this enactment from which it is possible to infer the right to make arrests is the provision that it is your Department's “duty to enforce” certain laws. In determining the meaning of this requirement we must look to all parts of the Act. This is necessary even though the words are the plainest. (Endlich on the Interpretation of Statutes, p. 45, sec. 35.) Section 9 of this Act provides that when in the opinion of the Fire Marshal or his deputies there is sufficient evidence to charge any persons with an offense, he “shall cause such person to be arrested and charged with such an offense as the evidence may warrant.” It is not anticipated that the Fire Marshal or his deputies make arrests but they “cause such persons to be arrested.” Upon an investigation of the different statutes creating and relating to the duties of the State Fire Marshal and his deputies it does not appear that it was the in-

tention of the Legislature to vest in them any special rights to make arrests by virtue of their office. The duty to enforce the law as used in this statute means the duty to cause it to be executed.

Tennant v. Kuhlemer, 142 Iowa 241; 19 Ann. Cases 1026; 120 N. W. 689.

(2). When we read that part of section 2 of the Act creating the office of State Fire Marshal we find that it is the duty of the "State Fire Marshal, his deputies and assistants, to enforce the laws of the State relating to installation and maintenance of automatic and other fire alarm systems and fire extinguishing equipment." This quotation only sets out that part of the section relevant in determining whether the State Fire Marshal has power to require the installation of equipment to better water pressure of water companies serving municipalities. This section definitely limits the power of the State Fire Marshal *to the enforcement of laws* relating to the maintenance of automatic and other fire alarm systems. Therefore, unless there is a law providing for the installation of such equipment the State Fire Marshal has no power to require the company to make such improvements. The law providing for the installation and maintenance of fire alarm systems and fire extinguishing equipment is found in section 8 of the Act creating the office of the State Fire Marshal, and this section gives power, not over water companies serving municipalities, but over certain buildings and equipment thereof. The duty of supervising, regulating and controlling water companies is charged to the Alabama Public Service Commission. (Acts 1915, p. 866.) The authority of the Fire Marshal does not include the power to compel the water companies to put in equipment necessary to increase the water pressure, thereby improving fire protection.

The conclusions reached in this letter in no way prevent the State Fire Marshal from suggesting that such improvements are necessary, and in securing the installation of such equipment by the use of his influence or other legal methods.

Very truly yours,
HARWELL G. DAVIS,
Assistant Attorney General.

HEALTH DEPARTMENT; OFFICE HOLDERS:—County health officers selected under 1915 Act serve for full terms and receive compensation under 1915 Act but their successors are selected and paid in accordance with the 1919 Act.

January 21, 1920.

Hon. S. W. Welch,
State Health Officer,
Montgomery, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 15th instant.

I note you state that in 1917, the Pickens County Court of County Commissioners established an all-time health officer in Pickens County, and Dr. E. B. Durrett was elected County Health Officer, and has served in that capacity ever since. I note you state that the Commissioners Court of Pickens County has recently refused to appropriate money under the new law for the maintenance of the health department of Pickens County, and that you ask advice as to whether or not the Commissioners Court has discretion in the matter, inasmuch as the office of County Health Officer has already been established; that you also inquire whether or not the Health Officer is not as much an officer of the county as the probate judge, and whether or not the decision of the Court in the case of Elmore County vs. Justice, applies to the health officer of Pickens County and would apply to any health officer elected from this time on.

The Supreme Court of Alabama held in the case of State v. Sanders, 65 So. 379, and Harrington v. State, etc., 76 So. 422, that the officers of the health department were not constitutional officers and were not officers within the general acceptance of that term of use in this State, although they were officers in a certain sense and for certain purposes.

In the Justice case to which you refer, 76 So. 425, the Supreme Court held that where the county commissioners court has declared the necessity for an all-time health officer and put into operation Acts of 1915, pages 786 to 788, it could not revoke it or thereby deprive Justice, who had been duly appointed health officer for three years pursuant to the statute by the county board of health, his right to serve out his term; the power to suspend laws being inherent in the Legislature only.

Subdivision 2, Acts 1915, page 786, provides for the election of a county health officer "for a term of three years" by selection by the County Board of Health and an appropriation by the County Board of Revenue. The compensation of the county health officer is fixed by the provisions of section 2, Acts 1915, page 788, according to a sliding scale.

While section 2 of the Acts of 1915, just referred to, is repealed by the provisions of section 8, Acts 1919, page 914, I am of the opinion that this repeal only operates as to the method of selection and the election of county health officers subsequent to September 29, 1919, the date of the approval of the act, and that it was not the intention of the Legislature to terminate the terms of health officers who had previously been elected under the 1915 Act "for a term of three years."

The 1919 Act in section 21 thereof provides that all laws and parts of laws in conflict with it are repealed with the proviso that nothing contained in the 1919 Act should be construed to repeal any existing laws, or to affect any statutes unless specifically mentioned in the 1919 Act. Section 5, Acts 1919, page 912, provides the same general system of selection of county health officers and fixing the term of office at not less than three years.

It seems to me that it was the purpose of the Legislature, inasmuch as no specific provision is contained in the Act to the contrary, to allow county health officers who had already been selected under the 1915 Act for a term of three years, to hold their offices until the expiration of that time, and that at the termination of their tenure of office it was intended by the Legislature that their successors should be selected according to the method set out in the Act of 1919, and that officers so selected should be paid in accordance with section 10 of the 1919 Act, page 915, at the rate of not less than \$200 per month, all officers having been selected under the 1915 Act to serve the remainder of their terms under the plan of compensation set forth in the 1915 Act, which is the sliding scale herein above mentioned.

Cases will be found in Michie's Alabama Digest, page 693, section 2, holding that the Legislature may abolish any office which it may create and the abolition of such office terminates the rights of the incumbents to exercise the rights and duties thereof when such offices are not pro-

vided for in the Constitution of Alabama. I do not think, however, that it was the purpose of the Legislature in enacting the health Code of 1919, to legislate the present county health officers out of their offices. And I further think that the County Board of Revenue is unjustified in its position to the appropriation of Dr. Durrett's salary, that appropriation having been provided for when he was selected by the Court of County Commissioners in 1917 under the 1915 Act for a term of three years. The 1915 Act provides that when the Court of County Commissioners shall have acted and this shall have been followed by action of the county board of health, the Health Officer was thereby "selected for the county for a term of three years."

Very truly yours,

LAMAR FIELD,
Assistant Attorney General.

DOG LAW:—Expenses of poor patients in attending Pasteur Institute are paid from State treasury on warrant drawn by State Auditor upon proof made to circuit clerk of county. Damages to live stock also paid from State treasury, but not until end of fiscal year.

January 22, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 8th instant, asking for an opinion as to certain portions of an Act for the protection of human beings and of live stock of all kinds, Acts 1919, page 1077. You state that a number of claims have been sent to your office from various counties for the reimbursement of expenses of Pasteur Institute patients and for killing of sheep, and you request advice as to whether such claims are payable out of the dog registration fees collected in the county where such patients reside, and where the sheep were killed, or whether the claims are payable out of the dog registration fees from the State as a whole. You further request advice as to the time when you may lawfully issue warrants in payment of such claims.

The matters concerning which you inquire are controlled by sections 13, 16 and 17 of the Act referred to. Section 13 provides that persons who have been bitten by mad dogs and who furnish satisfactory proof of same to the clerk of the circuit court of the county in which such persons were so bitten, may, upon furnishing to the circuit clerk good and sufficient proof that such person is not financially able to pay his or her expenses for treatment at the Pasteur Institute of this State at Montgomery, have his or her expenses paid to and from Montgomery, likewise expenses while under treatment at said Institute, payable out of the dog tax fund by the State Treasurer upon the certificate of the circuit clerk upon warrant drawn by the State Auditor. It will be noted that the person desiring to make the claim is required to make certain proof before the clerk of the circuit court who is required by the act to make a certificate, and when this certificate shall have been made, the claimants may be paid by the State Treasurer upon warrant drawn by the State Auditor.

The method of procedure for proving claims for the killing of sheep, etc., is set out in section 17 of the act, which requires a justice of the peace, upon application of the owner of sheep, lambs or other live stock which have been killed or injured, or his agent, to summon two reputable and discreet persons who shall examine into the facts and appraise the amount of the damage sustained by the owner, the appraisers being required to make a return to the justice of the peace who, if it appears that such sheep, etc., were killed or crippled by dogs not belonging to the owner of the animals or poultry, shall approve the return by endorsing it and forwarding all papers to the clerk of the circuit court who is required to receive it and present the papers to the State Auditor, it being provided that no claims of this nature shall be allowed unless the owner shall report such killing or maiming to a justice of the peace or other officer authorized to take oaths or before whom affidavits can be made. While it is not specifically so stated in this section that such claims shall be paid by the Treasurer upon warrant drawn by the State Auditor, this section does require that the claims be forwarded to the State Auditor, and I think it was the intention of the legislature that the claims should be paid by the State Treasurer on warrant drawn by the State Auditor as is specifically provided in

section 13 of the act with reference to claims of persons bitten by mad dogs.

Mr. Brown of this office has heretofore advised you that payments may be made to persons who have been bitten by mad dogs as such claims accrue and are properly proven for the purpose of reimbursing them for expenses incurred by them in taking Pasteur treatment, and I omit that question, confining myself to the provisions of the act relating to claims for injury to live stock.

You will note that section 16 of the act provides that in the event the funds arising from the act for any one year shall be insufficient to pay the expenses incident to the execution of the law, and then to pay the whole amount of expenses of poor persons who have been bitten by mad dogs and of damages inflicted by dogs on sheep, etc., in the counties in which such damages occur, "each sufferer shall be paid out of the said fund in proportion to the loss sustained." I think it clear that it was the intention of the Legislature that no claims of persons for injury of live stock by dogs should be paid until the end of the fiscal year. If at that time there shall be sufficient funds collected under the provisions of this act to pay all such claims, they shall be paid in full. If there be not sufficient funds to pay all such claims in full, then each claimant is entitled to have his claim prorated so that all claimants will receive the same percentage of the full amount of their claims as all other persons receive. To illustrate; if the total of such claims at the end of the year should amount to \$10,000, and the total amount of money collected under the provisions of the act, and not used for other purposes, should amount to \$5,000, each claimant would be entitled to receive 50% of the amount of the claim filed by him.

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

HARBOR COMMISSION:—Members are allowed traveling expenses reasonably necessary to discharge their duties. Balance in treasury of Harbor Commission does not revert to State treasury. City and county of Mobile required to pay over to the Harbor Commission amounts formerly paid for harbor master's and city wharfinger's salaries.

January 24, 1920.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol.

Dear Sir:

While the State Harbor Commission is vested with corporate powers which it may exercise (Acts 1915, p. 681, Sec. 10), it is also a governmental agency of the State, charged with the exercise of certain police powers in reference to the protection of commerce in Mobile Harbor and the Port of Mobile. (Acts 1915, p. 678); *American Bonding Co. v. New York & Mexican Whiting Co.*, 11 Ala. App. 578, 66 South. 847).

Like other governmental agencies to which are entrusted the disbursement of public funds derived from taxes imposed upon the people, or fees levied in the exercise of the State's police powers, it is subject to the rule that none of its funds can be expended except for the purposes clearly authorized by as strict a construction as is consonant with upholding the spirit of the law. (*Posey v. Mobile County*, 50 Ala. 6; *Naftel v. County of Montgomery*, 127 Ala. 563.)

We are compelled to apply this rule in determining whether or not an expenditure is authorized, regardless of the splendid purpose prompting the disbursement, and the beneficial results obtained therefrom. As the expenditures specifically authorized do not apply to the question now under consideration, it is necessary to ascertain whether the authority to make these expenditures is contained within the general terms of those provisions giving power to use the funds of the Commission. There are only two such clauses, which, for convenience, are set out, to-wit:

"The commissioners shall serve without compensation, but all traveling expenses incurred by the board in the performance of their duties shall be paid for out of the funds in the treasury." (Sec. 2., p. 678.)

"But, however, the board shall have power and they are expressly authorized, to expend the revenues, cash and credits received by them or collectible by them, under the laws now or hereafter existing, for personal services and salaries of employees, and other purposes herein authorized, and for operating expenses." (Sec. 8½, p. 679.)

For the authority to be included in that part of section 8½ set out supra, it is then necessary that the expenditure be for a purpose elsewhere authorized in the statute. As this clause gives no right in itself to make the disbursement, it is eliminated from consideration unless that right is found under that part of section 2 quoted supra. Said section 2 limits the right to payment of "traveling expenses incurred by the board in the performance of their duties." There is no authority for the payment of the traveling expenses of a person not connected with the Board. Furthermore, only those traveling expenses of the Board are payable which are in the *performance of their duties*. An examination of the entire act is necessary to ascertain just what duties are imposed on the Commission. While they are authorized to meet at such places as may be selected by them, this could not be construed as giving them the power to select arbitrarily a meeting place without regard to the expenses and the best interest of the duties with which they are charged. If so, they might meet at Tokio, Japan.

The limits of their right of travel, however, cannot be prescribed by territorial boundaries, but are tested rather by the rule of reason, whether or not it is reasonably necessary for the proper discharge of the duties of the Commission. The duties of the State Harbor Commission are principally confined to the Harbor of Mobile and the Port of Mobile. While it is possible that a trip to Washington might be justified in the discharge of its duties, as the rules and regulations of the Commission are subject to the regulations of the Federal Government in certain instances, yet we find no intimation in the law that the funds of the Commission can be used for the purpose of promoting favorable legislation.

Replying to that part of your inquiry asking whether the balance in the treasury of the State Harbor Commission on September 30, 1919, on which there was no outstanding indebtedness, should revert to the State, I beg to advise that under the State Harbor Commission Act it is contemplated that these funds be held by the Commission for the promotion of the purposes of the act, and I do not think that it was contemplated by section 55, page 994, Acts of 1919, that this fund should revert to the State treasury.

Relative to your inquiry as to the constitutionality of section 57 of the State Harbor Commission Act, I beg to advise that this section was held to be constitutional in an opinion rendered the Governor on May 2, 1916, by the Honorable Wm. L. Martin, then Attorney General. (Attorney General's Report, 1914-16, p. 353.)

Under this section, the City of Mobile and the County of Mobile should pay into the treasury of the State Harbor Commission the amounts which they formerly paid for harbor master and city wharfinger salaries. This amount was regulated by section 4926 of the Code of 1907, which provided that the City of Mobile should pay the harbor master twelve hundred dollars per annum, and that the County of Mobile should pay three hundred dollars per annum.

Yours very truly,
J. Q. SMITH,
Attorney General.

LICENSES:—Funds arising from chauffeurs' licenses are not divided with the county but go to the State.

January 28, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:
Inquiry:

"Does the act approved September 30, 1919, require an apportionment of the funds arising from the sale of chauffeur's license between the State and county in the same manner as the motor vehicle fund is apportioned by virtue of the following provision: 'It shall be the duty of the State Tax Commission to procure and distribute to the several Probate Judges of the State all chauffeur licenses and badges in the same manner as automobile licenses and tags are procured and distributed, and it shall be the duty of the several probate judges to issue and account for chauffeur licenses as motor vehicle licenses are issued and accounted for, under rules and regulations prescribed by the State Tax Commission.'"

The Act approved September 30, 1919, is an amendatory act amending sections 23, 24, 28, 29, and 33 of an act approved April 22, 1911. Acts 1919, p. 1002; Acts 1911, p. 634. In construing an amendatory act it is to be presumed that the Legislature did not intend to make any alterations in the law beyond what it explicitly declares, either in express terms or by unmistakable implication. Before the courts will pronounce that the law is changed the language employed must be susceptible of no other just interpretation.

Cloverdale Homes v. Cloverdale, 182 Ala. 419, 62 So. 712;

Brown, Insurance Commissioner, v. Protective Life Insurance Company, 188 Ala. 166; 66 So. 47;

Lanford v. Dunklin, 71 Ala. 594; Bradley v. State, 69 Ala. 318.

Under the act approved April 22, 1911, all funds received from the sale of chauffeur licenses went to the State. A careful consideration of the entire amendatory act fails to clearly disclose any legislative intent to make any change in the amended act except as to the method of issuing and collecting said licenses. The provision of the amendatory act set out in the inquiry does not measure up to that standard of clearly indicating an intent to change the law relative to the apportionment of funds arising from the sale of such licenses, as is required before a change can be pronounced. This clause refers to the issuing and accounting for chauffeurs' licenses and not to the apportionment of funds derived from the sale thereof between the State and county. The word "account" is flexible in meaning and often includes no more than a list or catalogue of items and transactions.

State vs. Ill. Central R. R. Co.; 92 N. E. 814;

Sharp vs. Zeller, 38 So. 449.

That the word "account" as used in the provision under consideration means simply a reporting by the probate judge to the State Tax Commission of the issuing of chauffeurs' licenses, and not the apportionment of funds derived therefrom is further evidenced by the fact that this ac-

counting is regulated by rules prescribed by the State Tax Commission. This Commission would have no authority to direct an apportionment of the funds.

There being no language employed in the amendatory act which is susceptible of no other just construction except an intent to change the disposition of these funds, it is necessary to conclude that no change was intended, and that the funds received from the sale of chauffeurs' licenses are not apportioned between the State and counties as are funds received from motor vehicle licenses, the entire sum belonging to the State.

Yours truly,
HARWELL G. DAVIS,
Assistant Attorney General.

TAX COLLECTOR:—When February 1st falls on Sunday, tax books are closed January 31st, at midnight.

Hon. A. H. Eubank, January 28, 1920.
Tax Collector,
Montgomery, Ala.

Dear Sir:

I beg to acknowledge receipt of your letter of January 27, asking whether or not Tax Collectors can collect on Monday, February 2. I beg to advise that February 1 falls on Sunday and that the Tax Collector's office closes for the collection of taxes at 12 o'clock of the night of the 31st of January.

Hoping that this is the explanation that you desire, I am,

Very truly,
J. Q. SMITH,
Attorney General.

PUBLIC SERVICE COMMISSION:—Members are officers of Executive Department and the Governor may require from them information in writing under oath.

January 29, 1920.
Hon. Thos. E. Kilby, Governor,
Capitol.

Dear Sir:

In reply to your inquiry whether and to what extent the members of the Public Service Commission of this State

are included among the officers from whom the Governor may require information in writing under oath relative to the duties for their respective offices, as provided in section 121 of the Constitution, which says:

“The Governor may require information in writing under oath from the officers of the executive department named in this article or created by statute, on any subject relating to the duties of their respective offices.”

I beg to advise:

The Public Service Commission are not officers named in Article Five of the Constitution, referred to in the section of the Constitution from which we have quoted, but they are officers created by statute, and it is only left to be determined whether they are officers of the executive department. If they are such officers, then the Governor may at any time require from them information in writing under oath relating to the duties of their respective offices.

It has been held in various cases that the Public Service Commission (which for the purpose of this discussion may be considered the same as the former Railroad Commission) exercises both quasi-legislative and judicial functions, which doubtless has led to doubt in the minds of some as to whether they came within the list of officers intended to be controlled by section 121 of the Constitution.

In the case of *Railroad Commission v. Alabama Northern Railway Co.*, 182 Ala. 357, 363, Justice Anderson, speaking for the court, said:

“Indeed, the power of the Legislature to create a railroad or corporation commission, and through them to exercise its power of regulation over railroads, has been repeatedly sustained, subject to the limitations that they cannot be invested with strictly legislative or judicial powers, and that their power and proceedings must be within constitutional restrictions relating to due process of law, and equal protection of the laws, and that a State cannot authorize a railroad commission to regulate interstate commerce.”

And as to the effect of the rulings of the Commission it was said by Justice Gardner, speaking for the court in

Railroad Commission v. St. Louis & San Francisco Railroad Co., 195 Ala. 529:

"It is recognized in this State, and it is unquestionably a salutary rule, that the order of the Railroad Commission is presumably reasonable, and the court will not overturn its findings unless it clearly appears that such order is unjust and unreasonable.—R. R. Com. Ala. v. Ala. Northern Ry. Co., 182 Ala. 357, 62 South, 749; R. R. Com. of Ala. v. Ala. Great So. Ry Co., 185 Ala. 354, 64 South, 13, L. R. A. 1915-D, 98."

In the case of Haynes v. Commonwealth, 104 Va. 854, the Supreme Court of Virginia was considering the question of whether a policeman was an executive officer, within the meaning of a code section making it a felony to offer any gift or gratuity to any executive, legislative or judicial officer. The court held that the section embraced all inferior executive officers whose duties are for the most part ministerial. It was said:

"It is contended on behalf of the accused, that a police officer is not such an officer as was contemplated by section 3744 of the Code—that he is not an 'executive' but a purely ministerial officer.

"A policeman is a State officer (Burch v. Hardwick, 30 Gratt. 24, 32 Am. Rep. 640), and we are of the opinion that the statute was designed to embrace such an officer within its terms. In the triple classification employed by section 3744, the term 'executive officer' is not limited in its application to the chief magistrate of the Commonwealth, but embraces as well inferior executive officers whose duties are for the most part ministerial.

"In Throop on Public Officers, section 23, the author, quoting from Judge Cooley, says: 'The duties imposed upon the officer are supposed to be capable of classification under one of these heads: the legislative, executive, or judicial; and to pertain accordingly to one of the three departments of government designated by these names. But the classification cannot be very exact and there are numerous officers who cannot be classified at all under these heads. The reason will be ap-

parent if we name one class as an illustration. Taxing officers perform duties which in strictness are neither executive nor judicial, though in some particulars they must execute the orders of superiors, and others they judge for themselves what is to be done, but, sometimes, also, their duties partake of the legislative. All such officers are usually called administrative, while inferior executive officers are designated ministerial.'

"In the light of this authority, a ministerial officer is an executive officer, and is included within the class embraced by that term, though he may be regarded as an inferior executive officer. A policeman is not, however, a purely ministerial officer. His general duties are defined by clause (1) of Section 1017a, Va. Code, 1904, as follows: 'The officers and privates constituting the police force of the cities and towns of the Commonwealth of Virginia shall be, and they are hereby, invested with all the power and authority which now belong to the office of constable at common law in taking cognizance of, and enforcing, the criminal laws of the Commonwealth, and the ordinances and regulations of the city or town, respectively, for which they are appointed or elected and it shall be the duty of each and every one of such policemen to use his best endeavors to prevent the commission within the said city or town of offenses against the laws of said Commonwealth, and against the ordinances and regulations of said city or town; to observe and enforce all such laws, ordinances and regulations; to detect and arrest offenders against the same; to preserve the good order of said city or town, and to secure the inhabitants thereof from violence and the property therein from injury.'

"Some of the duties here prescribed are ministerial, but many of them are in a high degree executive. It is the chief duty of a policeman to execute the laws of the Commonwealth, both for the punishment and prevention of crime; indeed his most important powers and duties are executive. But if his functions be regarded as chiefly ministerial, he comes within the reason, letter and meaning of the statute, which makes it a felony to offer a bribe to any executive officer of the Commonwealth to influence his act; for, as already

said, public officers whose duties are ministerial are included under the head of 'executive officers.' It cannot be supposed that the Legislature intended that the crime denounced by section 3744 of the Code, could be committed with impunity by those executive officers whose duties may be defined as being chiefly or entirely ministerial. Such a construction would exclude from the operation of the statute a large number of the public officers of the Commonwealth."

From the court's opinion in the case of *Kansas v. Missouri Pacific Ry. Co.*, 76 Kans. 467, we take the following, relative to the powers and duties of boards of railroad commissioners:

"Defendant attacks the constitutionality of the law creating the board of railroad commissioners upon the ground that it attempts to delegate to the board legislative authority. The exact question presented here has been decided so often by the courts of last resort, the subject has been so exhaustively discussed and elaborated, and the field for original comment or suggestion has been reduced to such narrow limits, that very little is left but to repeat what others have said. In a majority of the states of the Union the legislatures have created commissions and conferred upon them the power to regulate and control the operation of common carriers, to fix rates and schedules for the transportation of passengers and freight, to hear and determine complaints of the people against the carrier and to act thereon, and the power to create such agencies, and to confer upon them these powers, has been repeatedly recognized and upheld by the supreme court of the United States.

"Our constitution contemplates the complete separation of the three governmental powers as clearly as though it so declared in express terms. (In *re Sims*, Petitioner, 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110, 45 Am. St. Rep. 261; *The State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662; In *re Davis*, 58 Kan. 368, 49 Pac. 160). The Constitution vests all legislative power in a legislature, consisting of a senate and a house of representatives. It cannot be doubted that

the legislature is not authorized to delegate this legislative power. It may not confer upon any person, board or commission the power of determining what the law shall be. These propositions are elementary. Notwithstanding these well-established maxims, the separation of the powers of government is complete only in theory. In *re Sims*, *supra*, Mr. Justice Johnston, in concurring used this language:

“It is highly important to separate the legislative, judicial and executive functions, and that the officer of one department should not exercise the functions conferred upon another. Under our system, however, the absolute independence of the departments and the complete separation of the powers is impracticable, and was not intended.” (Page 11).

“As early as 1871, in *Coleman v. Newby*, 7 Kan. 82, Mr. Justice Valentine said::

“While the legislature possesses all of the legislative power of the State, and while it is true that they cannot delegate any portion of that power to any other body, tribunal, or person, yet it is generally found impracticable for them to exercise this power in detail. They may do so if they choose, or they may enact general provisions, and leave those who are to act under these general provisions to use their discretion in filling up the details. They may mark out the great outlines, and leave those who are to act within these outlines to use their discretion in carrying out the minor regulations.” (Page 88).

“And in *Chicago & N. W. Ry Co. v. Dey*, 35 Fed. 866 1 L. R. A. 744 Mr. Justice Brewer commented as follows upon the distinction theoretically and as applied to legislative acts conferring administrative powers:

“Third. While, in a general sense, following the language of the supreme court, it must be conceded that the power to fix rates is legislative, yet the line of demarcation between legislative and administrative functions is not always easily discerned. The one runs into the other. The law books are full of statutes unquestionably valid in which the legislature has been content to simply establish rules and principles, leaving

execution and details to other officers. Here it has declared that rates shall be reasonable and just, and committed what is, partially at least, the mere administration of that law to the railroad commissioners. Suppose, instead of a general declaration that rates should be reasonable and just, it had ordered that the rates should be so fixed as to secure to the carrier above the cost of carriage three per cent upon the money invested in the means of transportation, and then committed to the board of railroad commissioners the fixing of a schedule to carry this rule into effect, would not the functions thus vested in such a board be strictly administrative? While, of course, the cases are not exactly parallel, yet the illustration suggests how closely administrative functions press upon legislative power, and enforces the conviction that that which partakes so largely of mere administration should not hastily be declared an unconstitutional delegation of legislative power. Fourth. The reasonableness of a rate changes with the changed condition of circumstances. That which would be fair and reasonable today, six months or a year hence may be either too high or too low. The legislature convenes only at stated periods; in this State once in two years. Justice will be more likely done if this power of fixing rates is vested in a body of continual session than if left with one meeting only at stated and long intervals. Such a power can change rates at any time, and thus meet the changing conditions of circumstances. While, of course, the argument from inconvenience cannot be pushed too far, yet it is certainly a matter of inquiry whether in the increasing complexity of our civilization, our social and business relations, the power of the legislature to give increased extent to administrative functions must not be recognized.' (Page 874).

"In *The State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662, the act creating a court of visitation was held to be unconstitutional and void for the reason that in the powers conferred on that tribunal legislative, judicial and administrative functions were so commingled and interwoven as to violate the constitutional requirements that the three departments of state be kept separate. It was said, however, in the opinion:

“ ‘Legislative power to prescribe rates, which railway corporations may charge for carrying freight or passengers exists beyond question, and its exercise has been uniformly upheld by the courts. And this power the lawmakers may delegate to boards or commissioners, which has been frequently done. (*Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636). The extent of the power is curtailed only by limitations placed upon it by the courts in the application of certain constitutional guaranties prohibiting the destruction of property rights vested in the owners of the railway. (*Chicago &c. Railway Co. v. Minnesota.*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970)’ (Page 816).

“The power conferred is uniformly held to be administrative in its character, though the term ‘executive’ has been used by the supreme court of the United States in defining it. It has, however, no relation to, or dependence upon, the executive power spoken of as one of the three governmental powers, for its function is that of carrying into effect the legislative will, and in its operation it is a part of the legislative act. This is the doctrine of the Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 29 L. Ed. 636, which was approved in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. The language of Mr. Justice Brewer in the latter case is as follows:

“ ‘Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by legislation. Railroad Commission cases, 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 29 L. Ed. 636. No valid objection, therefore, can be made on account of the general features of this act; those by which the state has created the railroad commission and entrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads; of the state.’ (Page 394).

“Commenting upon the same objections to a similar law the supreme court of Illinois, in the case of *C. B. & Q. R. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L.

R. A. 141, 41 Am. St. Rep. 278, used the following language:

"The act of 1873 is said to be invalid because, instead of establishing reasonable maximum rates of charges, it is supposed to delegate the power to establish such rates to the railroad and warehouse commissioners. It has been held in a number of cases that statutes which create boards of commissioners and authorize them to make schedules of rates for railroad companies are not invalid for the reason here urged. The doctrine of these cases is that the functions of such boards are administrative rather than legislative; that the authority conferred upon them relates merely to the execution of the law; that a grant of legislative power to do a certain thing carries with it the power to use all proper and necessary means to accomplish the end, and that, as the reasonableness of rates changes with circumstances and legislatures cannot be continuously in session, the requirement that the statute itself shall fix the charges might preclude the legislature from the use of the agencies necessary to perform the duty imposed upon it by the constitution; in short, that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself." (Page 378).

"The supreme court of the United States, in a very recent case, has had occasion to pass upon the same question as applied to acts of congress conferring administrative functions upon individual officers. In *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, the question arose over the validity of the river and harbor act of 1899, by which congress conferred upon the secretary of war the power to determine when any railroad or other bridge over a navigable stream constituted an obstruction to navigation, and to notify the owners thereof to alter or remove the same. The question to be determined was whether the act was a violation of the constitution of the United States as delegating legislative and judicial powers to the head of an executive department of the government. The opinion reviews the authorities, and

at page 382, quotes from *Field v. Clark*, 143 U. S. 649, 693, 12 Sup. Ct. 495, 36 L. Ed. 294, as follows:

““The true distinction,” as Judge Ranney, speaking for the supreme court of Ohio, has well said, “is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.” *Cincinnati, Wilmington & C. Railroad v. Commissioners*, 1 Ohio St. 77. In *Moers v. City of Reading*, 21 Pa. St. 188, 202, the language of the court was: “Half of the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.” So, in *Locke’s Appeal*, 72 Pa. St. 491, 498, 13 Am. Rep. 716; “To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.” The proper distinction the court said was this: “The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation”.”

“Counsel for defendant calls particular attention to the case of *Chicago & C. Railway Co., v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970, where the Minnesota law creating a railroad commission was held to be in conflict with the Constitution of the United States. The particular reason why the Minnesota statute was held to be unconstitutional does not apply to

this case. The Minnesota court construed the act to mean that the rates recommended by the commission should be not merely *prima facie* equal and reasonable but final and conclusive as to what were reasonable and equal charges, and held that the law neither contemplated nor allowed any issue to be made or inquiry to be had as to their equality or reasonableness in fact, and that in a proceeding for mandamus under the statute there was no fact to traverse except the violation of the law in not complying with the orders of the commission. The supreme court declared that it was bound by the construction which the Minnesota court had placed upon the statute, and that so construed the act deprived the railroad company of its right to a judicial investigation by due process of law. No such objection can be urged to the Kansas act. In a specially concurring opinion in that case Mr. Justice Miller laid down certain fundamental propositions; among others, the following:

“1. In regard to the business of common carriers limited to points within a single state, that state has the legislative power to establish the rates of compensation for such carriage.

“2. The power which the legislature has to do this can be exercised through a commission which it may authorize to act in the matter, such as the one appointed by the legislature of Minnesota by the act now under consideration.” (Page 459).

“The following additional authorities, and many others that might be cited, sustain the doctrine that while the legislature may not delegate its strictly legislative powers it may delegate authority to perform certain functions which are administrative in character and which cannot well be performed by the legislature itself: *C. W. & Z. Railroad Co. v. Commissioners of Clinton County*, 1 Ohio St. 77; *Tilley v. Railroad Commissioners*, 4 Woods (U. S. C. C.); 427, 5 Fed. 641; *Georgia Railroad et al v. Smith et al.*, Railroad Commissioners, et al., 70 Ga. 694; *Express Co. v. Railroad*, 111 N. C. 463, 16 S. E. 393, *State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 38 Minn. 281, 37 N. W. 782; *State v. F., E. & M. V. R. R. Co.*, 22 Neb. 313, 35 N. W. 118; Chi-

cago, etc. *R. R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Peik v. Chicago etc. Railway Co.*, 94 U. S. 164, 24 L. Ed. 97; *Chicago etc. R. R. Co. v. Ackley*, 94 U. S. 179, 24 L. Ed. 99; *Winona & St. Peter R. R. Co. v. Blake*, 94 U. S. 180, 24 L. Ed. 99; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. Ed. 102; *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. Ed. 812; *Illinois Central R. R. Co. v. Illinois*, 108 U. S. 541, 2 Sup. Ct. 839, 27 L. Ed. 818; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 317, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Stone v. Illinois Central R. R. Co.*, 116 U. S. 347, 6 Sup. Ct. 348, 388, 1191, 29 L. Ed. 650; *Stone v. N. O. & N. E. Railroad Co.*, 116 U. S. 352, 6 Sup. Ct. 349, 391, 29 L. Ed. 651; *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. Ed. 841; *Charlotte &c Railroad v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051; *Chicago &c Railway Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176; *Pearsall v. Great Northern Railway*, 161 U. S. 646, 665, 16 Sup. Ct. 705, 40 L. Ed. 838; *Minneapolis & St. Louis R'd. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; *Minn. & St. Louis R. R. Co. v. Minnesota*, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614; *C. B. & Q. Railway v. Drainage Comm'rs.*, 200 U. S. 561, 584, 26 Sup. Ct. 341, 50 L. Ed. 596; *Atlantic Coast Line v. Florida*, 203 U. S. 256, 17 Sup. Ct. 108, 51 L. Ed. 174; *Seaboard Air Line v. Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 59 L. Ed. 261; *Commissioners v. A. C. L. Ry.*, 71 S. C. 130, 50 S. E. 641.

"In fact, the power of the legislature to delegate merely administrative functions in this manner has been so thoroughly established in the several states, and so often held by the federal supreme court to apply to acts of congress, that the question is no longer an open one. The latest utterance of the United States supreme court upon the subject is in the case of *Atlantic Coast Line v. N. Car. Corp. Com'n.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, in which Mr. Justice White, speaking for the court, used the following language:

"The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their opera-

tion are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by the administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine.' (Page 19).

"The next contention is that the act is void because it confers upon the board a combination of legislative, executive and judicial powers. It is sought to bring the case within the doctrine declared by this court in *The State v. Johnson*, 61 Kan 803, 60 Pac. 1068, 49 L. R. A. 662. In construing the act we start with the elementary proposition which all courts recognize; that every statute is presumed to be constitutional, and that no act of the legislature should be held to be unconstitutional unless its vice is apparent.

"It must be observed that none of the powers which the act confers upon the board is authorized by the constitution to be performed by any other person or officer or tribunal. In the absence of any limitation in the constitution the legislature has full power to make laws and create agencies to carry them into effect.

"The particular objection to the statute is that section 5970 of the General Statutes of 1901, and sections 4 and 9 of chapter 340, Laws of 1905, combine executive, legislative, and judicial power. The first clause of section 5970 reads as follows: 'Whenever in the judgment of the railroad commissioners it shall appear that any railroad corporation or other transportation company fails in any respect or particular to comply with the terms of its charter or the laws of the state,' etc. In the same section it is provided that 'said commissioners shall inform such corporation of the improvement and changes which they adjudge to be proper, by a notice thereof in writing, * * * and if such orders are not complied with, the said commissioners, upon complaint, shall proceed to enforce the same in accordance with the provisions of this act as in other cases.'

"It must be apparent that the use of the words 'judgment' and 'adjudge' in this section does not contemplate

a judicial judgment. The commissioners do not exercise judicial power within the meaning of that word as used in the constitution. When we come to consider this section with the other provisions of the act we find that after determining that 'any change in the mode of operating its road and conducting its business is reasonable and expedient in order to promote the security, convenience and accommodation of the public,' the board has no power to enforce an order to that effect. It may inform the company of the changes it desires made, but is powerless to compel any change until a hearing has been had 'upon complaint,' which means a full hearing, of which the company has been notified and at which it may appear and participate; and even after this has been done the board can only order that changes shall be made. The order is not conclusive or binding and the company, if it see fit, may ignore it until the reasonableness and lawfulness of the order have been solemnly adjudged by a court. There is no commingling of legislative, executive and judicial powers, so apparent in the court of visitation act, which conferred upon that tribunal the power to hear and decide, and to render a judgment and enforce it as a court.

"The finding and order of the board that a change in the operation of the road is expedient and reasonable, under section 5970, *supra*, partakes of none of the characteristics of a judgment rendered by a court. As observed, the road may ignore it. When mandamus proceedings are brought to enforce it the order itself is only *prima facie* evidence of its reasonableness. Not being conclusive, it affects the railroad company only as a rule of evidence. The same may be said of sections 4 and 5 of chapter 340 of the Laws of 1905. Section 4, expressly, and section 5, by necessary inference, require a hearing upon complaint, and the order when made has the same force as the order provided for in section 5970, *supra*, and no other or greater effect. The functions of the board under this act are, as we have said, purely administrative, and the fact that in the performance of these functions the board must hear complaints and determine them does not make their acts judicial. It is not every act which requires the exer-

cise of judgment and discretion which can be said to be judicial. Cooley, in volume 2 of the third edition of his works on Torts, at page 752 says: 'Official duties are supposed to be susceptible of classification under the three heads of legislative, executive and judicial, corresponding to the three departments of government bearing the same designations; but the classification cannot be very exact and there are many officers whose duties cannot properly, or, at least, exclusively, be arranged under either of these heads.'

"Where judgment or discretion is exercised as a mere incident to a ministerial power it has never been held to be the exercise of judicial power within the meaning of constitutions which, like ours, provide for the separation of the three departments of government. (*Owners of Lands v. The People ex rel.*, 113 Ill. 296; *Rich et al v. City of Chicago*, 59 Ill. 286, 295). In fact, the cases we have quoted from sustaining the power of legislatures to create boards of this character, and confer upon them power to regulate and control common carriers, afford a sufficient answer to the contention that the power conferred is either legislative, executive or judicial."

In the case of *Illinois Central Railroad Co. v. Dodd*, reported in 49 L. R. A. (New Series) 565, referring to the powers of a railroad commission, the Supreme Court of Missouri said:

"Turning now to the statute creating the railroad commission, we find that it is a mere administrative agency, having nowhere been given the power to apply the law to a state of facts, and to make a final declaration of the consequences which follow; all of its orders being subject to review by the courts, and when called in question being only *prima facie* correct. Code section 4836; *Western Union Telegraph Co. v. Mississippi R. Commission*, 74, Miss. 80, 21 So. 15; *Mississippi R. Commission v. Illinois C. R. Co.*, 203 U. S. 335, 51 L. Ed. 209; 27 Sup. Ct. Rep. 90. In *Western Union Telegraph Co. v. Mississippi R. Commission* it was said: 'The findings and determination of matters committed to the railroad commission by it are not final and con-

clusive, and were never so intended by the statute. It is a mere administrative agency, although, in some respects, it exercises quasi judicial power. But at last the reasonableness and consequently the lawfulness of its determination is left subject to judicial inquiry and decision. If a common carrier, required by the commission to do an act, is of opinion that the requirement is a violation of its legal rights, it may refuse compliance, and if, upon judicial inquiry, its contention is supported, is not punishable or liable for a failure to comply. But it takes the risk of coming under all penalties and liabilities declared by the statute if, upon such inquiry, the courts uphold the action of the commission. The statute, in express language, so provides. Section 4284 of the Code (4836 of our present Code) declares that "all findings of the commission, and the determination of every matter by it, shall be in writing, and proof thereof shall be made by a copy of the same, duly certified by the secretary under the seal of the commission; and whenever any matter has been determined by the commission in the course of any proceeding before it, the fact of such determination, duly certified, shall be received in all courts and by every officer in civil cases as prima facie evidence that such decision was right and proper." In *Stone v. Yazoo & M. Valley R. Co.*, 62 Miss. 607, 52 Am. Rep. 193, this court, and in *Stone v. Farmers' Loan & T. Co.*, 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191, the Supreme Court of the United States, necessarily held, in the language of the latter court in *Regan v. Farmers' Loan & Trust Co.*, 154 U. S. 394, 38 L. Ed. 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1053, that 'such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation.' In deciding whether or not the Connecticut Railroad Commission was clothed with judicial authority, the supreme court of that state, in *State v. New Haven & N. Co.*, 43 Conn. 351, said: 'We think that the commissioners were not judges, that their duties were not judicial, and that their decision was not a judgment, in such a sense as to have the effect claimed for it. The commissioners are nowhere in

the statute called or referred to as judges. The Constitution declares that the judicial power of the state shall vest in the supreme court of errors, the superior court, and such inferior courts as the general assembly shall from time to time ordain and establish. * * * Their duties, except in a very limited sense, are not judicial. They may, and doubtless do, in some cases, hear evidence, weigh it, and decide; and their decisions are in writing, and perhaps recorded. To that extent, as we said in *Chester v. Connecticut Valley R. Co.*, 41 Conn. 348, their duties are "judicial in character," and their decisions in popular language are often spoken of as judgments. But it is not their duty, and they have no power, to ascertain and determine the rights and enforce the relative duties of contending parties. Their whole power, and consequently their whole duty, in respect to the matter now under consideration, was to give or withhold their assent to the proposition of the railroad company. Their duties are not to enforce rights and redress wrongs, as a court of justice, but to stand in place of the legislature between corporations and the public, and supervise the exercise of corporate powers, so that no injustice may be done. The legislature might, and for a considerable period of time did, discharge these duties itself; but as railroads became more numerous, and complaints more frequent, the power was wisely delegated to a convenient board, that could act promptly and with advantage to all concerned. The duties of this board, therefore, are not judicial, but such as pertain to the administrative powers of the legislature itself." See also *People ex rel. Loughram v. Railroad Comrs.*, 158 N. Y. 430, 53 N. E. 163, and 33 Cyc. pages 46 and 52. From these views it necessarily follows that the railroad commission is not a tribunal of that character from which the legislature is authorized to grant appeals direct to this court."

We also append excerpts from the debates in the Constitutional Convention upon the question of making the office of member of the railroad commission a constitutional one.

"Section 15 was read as follows:

"Section 15. The power and authority of regulating railroads freights and passenger tariffs, the location

and building of passenger and freight depots, correcting abuses and preventing unjust discriminations and extortion and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred upon the Legislature, whose duty it shall be to pass laws from time to time regulating freight and passenger tariffs to prohibit unjust discriminations on the various railroads, canals and rivers of this State and prohibit charging other than just and reasonable rates, and enforce the same by adequate penalties.

"Mr. Sanford (Montgomery)—I have an amendment to Section 15.

"The amendment was read as follows: 'Amend Section 15 by striking out the words, "conferred upon the Legislature," in the fourth line of said section, and inserting in lieu thereof the words, "conferred upon the Railroad Commission," and also to strike out the remainder of the section beginning at the words "whose duty it shall be," in line four of said section.'

Mr. Sanford (Montgomery)—It seems to me that fifteen or twenty years ago, when this commission was established, it was proposed by the opponents of the commission to confer this power upon the Legislature to fix the rates, and with adequate provisions to compel their observance, and the advocates of the commission and friends of the railroad companies opposed it with great energy, but finally the commission was defeated, and afterward it was reconsidered and adopted. * * Now tell me what other matters can the railroad commission do except these that you have conferred upon the Legislature the right to do? It would be a useless body. If you adopt that, abolish the railroad commission, but I am against abolishing the railroad commission as it now stands, because the Legislature will meet only once in four years. How can it regulate rates of freight upon articles not yet perhaps invented or manufactured? How can it look for four years ahead when the very articles of commerce upon which freight is to be charged have no existence? The commerce of the world is increasing, and in a few years importations will be made not now known to the commerce of America. How then can the Legislature fix rates when it

meets only once in four years? Therefore, I insist that the amendment conferring the power upon the railroad commission ought to pass, and the balance of the section means nothing. It is merely a tub thrown to the whale to fool the fish. * * * * *

"Mr. Harrison.—As is well known by the delegates, the railroad commission is not a constitutional office. It has never been so. It was established by the Legislature by authority of the provision in the Constitution that I have read. (Section 22 of the Constitution of 1875). The Legislature has perfect power, as it has been doing, to pass laws to prevent these abuses and to appoint a commission to see that its laws are executed and carried into effect.

"Mr. Weatherly.—Would it not be the effect of the amendment proposed by the gentleman from Montgomery to deprive the Legislature of the power it now has to regulate that very matter by conferring it upon the railroad commission, and violating the other provisions adopted that the three departments of government shall not infringe on each other?

"Mr. Harrison.—Certainly. Wouldn't it be an infringement upon the prerogatives of the Legislature? Now the only change your committee has made has been to insert, in addition to the present Constitution, as I have just read it, is adding a section embodied in the Georgia Constitution, which state has a commission, and which a great many of the papers that came to your committee and filled the secretary's hands, many of them from the City of Birmingham, in a lot of typewritten petitions, prayed for * * * The Georgia Legislature established the Georgia Railroad Commission, to which all these petitions alluded, and after consultation, a majority of your committee believed this was not a constitutional office and never was made so by the people of Alabama and ought not to be made so, but that the Legislature, as the guardian of the people, vested with legislative rights, should have the power and retain it to correct these abuses, and we thought it best not to undertake to interfere with the manner in which they had done it, for they were powerful enough, but if there was anything in the Georgia Constitution

making it stronger, the majority of the committee were willing to agree and did agree to take it as a settlement of this issue. This does not hurt. It adds nothing in favor of the railroads, or any other corporation. * *

* * * * *

"Mr. O'Neal.—May I ask a question? Is not this provision even stronger than the Georgia law?

"Mr. Harrison.—It certainly is * * * * *
I therefore hope that the Convention will vote down the amendment * * * * *

"Mr. Espy.—Mr. President, you may search this Constitution that we are now making from end to end, and you cannot find as meaningless a section in it as this is. * * * * * Now I ask each member of that committee if the Legislature would not have everything that they attempt there to confer, if nothing was said there at all. * * * * * So this question comes back, for what purpose is the section incorporated into this Article? Can it be for any other purpose than to catch votes for the ratification of the Constitution? *
* * * * * The Georgia section confers the power upon the railroad commission. Here you put the power with the Legislature of Alabama and thereby deny the power to the commissioners until it is conferred by act of the Legislature.

"Mr. Vaughn.—Do you think it would be a good idea to make the railroad commissioners a constitutional office?

"Mr. Espy. —Yes, if we cannot get it otherwise, I think it might be a good idea to make it a constitutional office. There is no valid objection why it should not be done. Power has been conferred upon the commission in other states, and wherever it has been tried it has worked well and satisfied both the railroad and the people, and the amendment offered by the gentleman from Montgomery brings the issue squarely before this Convention, and that is whether this power shall be conferred upon the Legislature, or whether it shall be conferred upon the Commission, and I hope the amendment will be adopted.

"Mr. Cunningham.—Does the gentleman advance the idea that it will be safer in the hands of the Commis-

sion consisting of three, five, or seven, than in the Legislature, consisting of thirty-five senators and 105 representatives?

"Mr. Espy.—Judging from past experience, I would rather risk the commissioners.

"Mr. Cunningham.—And you subscribe to the doctrine, the nearer we get to a one-man government, and the further away you get from the people, the safer it is for the people.

"Mr. Espy.—Just to the contrary, because the commissioners ought to be elected by the people.

* * * * *

"Mr. Weatherly.—Would it not be the effect of the amendment to confer these powers directly upon the railroad commission, and take them away from the Legislature?

"Mr. Espy.—It certainly would confer them upon the railroad commission.

"Mr. Weatherly.—And wouldn't it deprive the Legislature from legislating upon these matters?

"Mr. Espy.—I do not think that would necessarily follow.

"Mr. Weatherly.—Could both bodies legislate contrarily for the same matter?

"Mr. Espy.—Possibly not, sir.

"Mr. Foster.—Have you read section 3491 (of the Code) as to the powers of the Commission?

"Mr. Espy.—Yes, sir, I read it all.

"Mr. Foster.—It strictly has the power in that to regulate rates.

"Mr. Espy.—I do not understand that they have the power to enforce their orders in that particular. * *

* * * * *

"Mr. Murphree.—I wish to state that this question of the railroad commission and the free passes are the only thing that created any friction at all in the Committee on Corporations. I was of the opinion of my friend from Montgomery, and also from Henry, but after deliberating over the question, and looking over it and debating it time and again we effected a compromise and therefore we make a unanimous report on

both. We have agreed upon these two sections, and I would be glad for the Convention to endorse that.

"Mr. Sanford (Montgomery)—And the compromises have been an abandonment of principle, and a matter of cowardice.

"Mr. Kyle.—I offer an amendment to the amendment.

"The amendment was read as follows: 'Amend section 15 in line five by striking out the following words: "From time to time regulating," and insert in lieu thereof the following: "At the first session after the ratification of this constitution and from time to time thereafter, authorizing the railroad commissioners of the state to regulate."

* * * * *

"Mr. Weatherly.—Is not the railroad commission a creature of the Legislature?

"Mr. Kyle.—It certainly is.

"Mr. Weatherly.—Then under this power, giving the legislature power to do this thing, can't it authorize its creature to do this thing?

"Mr. Kyle.—I want the Convention now to authorize the Legislature to do it, to require the Legislature to do it at the very first session, to authorize the railroad commission to do it.

"Mr. Pillans.—Would not the effect of the adoption of this amendment be to make the present railroad commission as now elected and of the number now provided, a constitutional office, which it would be very doubtful if the Legislature could ever hereafter change?

"Mr. Kyle.—I am not a constitutional lawyer and cannot answer your question.

(Mr. Harrison read sections 3491 and 3492 of the Code) * * * * *

"Mr. Beddow.—Can the gentleman show where the railroad commission can enforce any rate which they propose or make?

"Mr. Harrison— * * * * * The finding of that commission under the Alabama system is made prima facie correct, and when they fail to do it, they can go into any court of justice anywhere with the same certainty of recovery, the same as a man sues on

a promissory note. In fact, if you had a law that they have always regarded, whenever complaint was made, the railroads have always obeyed it, what is the necessity to make a more stringent law when they have not refused to obey the one you have given them?

* * * * *

"Upon a vote being taken the amendments were tabled.

"Upon a further vote being taken the section was adopted."

From the foregoing I am of the opinion that it fairly appears that the Public Service Commission are such officers as are required by section 121 of the Constitution to report to the Governor of the State.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

CONVICT HIRE:—Contract based on wages paid free miners, with allowance for administration and supplies, varies with increase or decrease in price of free labor.

February 3, 1920.

Hon. C. B. Rogers,
State Warden General,
Capitol.

Dear Sir:

Replying to your letter of February 2d, inquiring whether the per cent of increase or decrease provided for in section 4 of the contract between the State and the Sloss-Sheffield Steel & Iron Company, dated June 19, 1918, which leases certain convicts to the company for coal mining, should be calculated on the seventy-five cents per ton named in the contract, or on the net wages to the State expressed by the monthly pay of the miner, I beg to advise as follows:

It is evident from the terms of the contract that it was intended that the price paid free labor for the same character of work performed by the convicts should be the basis of pay of convict labor. The clause stating that the basis of the price set in the contract was "on the present price of seventy-five cents per ton paid to free miners, based on the

Mary Lee or Big Seam scale," would be unnecessary unless it had for its purpose making the seventy-five cents per ton the basis on which to calculate future prices. This clause would have no field of operation if the increase or decrease was simply a per cent of the amount per month stated in the contract as the amount due under the rate existing at the time the contract was executed.

Although the contract states that the price paid free miners is to be the basis on which is calculated the price paid for convict labor, yet it is impossible from the terms of the contract to ascertain how it is used as a basis in reaching the prices set out in the contract.

"In the construction of any written agreement it is proper to consider the circumstances surrounding the parties at the time of its execution—to take into account the motives as gathered from such surrounding circumstances, and in this way to learn the object intended to be accomplished thereby." *Alexander v. Sanders*, 93 Ala. 345.

Resorting to this extrinsic evidence, this office is advised that at the time this contract was executed free labor was receiving seventy-five cents per ton for pick mining, based on the Mary Lee or Big Seam scale, but that free labor was compelled to furnish its own ammunition and supplies; that the company in this case undertook to furnish the ammunition and supplies, at eleven cents per ton, thus making the price for first-class men eighty dollars per month, and from this base the scale was reached for the men of the other classes. It is evident, therefore, that it was the purpose of the contracting parties for first-class miners to receive the same price as free labor, less the expenses of ammunition and supplies, and on this amount received by free miners was to be based the scale of the price paid other men.

This being the intention of the parties at the time the contract was entered into, I am of the opinion that it should be the basis on which settlement is made.

Yours very truly,

J. Q. SMITH,
Attorney General.

MORTGAGE TAX:—Federal Land Bank mortgages not subject to privilege tax for recording.

Hon. Chas. E. McCall, February 4, 1920.
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

In reply to your inquiry of February 3d, whether Federal land bank mortgages are subject to the payment of the privilege tax on recorded mortgages in this state, I beg to advise that, as indicated in your letter, former Attorney General Martin, on August 7, 1917, ruled that such mortgages were not subject to the privilege tax on mortgages.

In view of the fact that since that opinion was rendered there has been a session of the legislature, which adjourned without attempting to overcome the effect of that ruling in any way, I am of the opinion that the conclusion stated in the opinion of the former attorney general to which you refer should continue to be adhered to, and such mortgages held not subject to the payment of the tax, regardless of what conclusion might be reached if the question were now presented for the first time.

Yours very truly,
J. Q. SMITH,
Attorney General.

HIGHWAY DEPARTMENT; GASOLINE INSPECTION LAW:—

Fuel oil inspection law does not contemplate payment of inspection fee on oil not sold in Alabama.

Mr. Robert B. Janney, Chemist, February 4, 1920.
State Highway Department,
Bell Building, City.

Dear Sir:

In reply to your inquiry of January 27th, I beg to advise that I am of the opinion that the fuel oil inspection law does not contemplate the collection of the inspection fee except on oil that is sold in Alabama, so that where the oil is not sold in Alabama the Highway Department would be authorized to make a refund.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

BANKS:—Blanket bond meets requirements of section 3 of 1919 banking law.

February 5, 1920.

Hon. D. F. Green,
Superintendent of Banks,
Capitol.

Dear Sir:

In reply to your inquiry of this date, I see no reason why the so-called blanket bond, or one bond covering all officials, will not meet the requirements of section 3 of an act approved September 30, 1919, "To further prescribe the qualifications and duties of directors of banks and trust companies doing a banking business in this state," as well as separate bonds for the several employees referred to in section 3 of said act; provided, of course, that the bond is in a sufficient amount to cover the combined loss that the bank might suffer due to the misconduct of any of these officers and employees.

Yours very truly,
J. Q. SMITH,
Attorney General.

OFFICE HOLDERS:—Compensation Commissioner is entitled to additional compensation for duties imposed by Act of 1919.

February 6, 1920.

Hon. Thos. E. Kilby, Governor,
Capitol.

Dear Sir:

In reply to your inquiry with reference to the compensation and expenses of the compensation commissioner under the Workmen's Compensation Act (Acts 1919, pages 206, 234), I beg to advise that I am of the opinion that while the director of the Department of Archives and History is also the compensation commissioner, he is not prohibited from receiving a salary for his services as such commissioner as contemplated by the act in question (section 39), nor is there any reason why such expense as he may incur in preparing a report shall not be paid out of the state treasury; the amount to be paid to the commissioner for his services to be such sum of money as the Governor of the

State may deem adequate, and the payment of such necessary reasonable expenses as the Governor may deem necessary and adequate.

However, I do not think that this would authorize the employment of a deputy to perform the duties of compensation commissioner, but it would cover clerk hire, and any other forms of expense, including traveling expense, which the Governor may deem necessary, and which therefore he would approve.

The rule is well settled that where new duties are imposed upon a public officer which are not within the scope of his office, and extra compensation is provided therefor, such increase in compensation is not within a constitutional provision prohibiting any increase in the compensation of any officer during his term of office.

This rule is well settled where the office is a constitutional one, because otherwise the Legislature would have authority to destroy in a way the office which the superior power of the Constitution had provided; and where the office is of statutory origin, where its duties are well and clearly defined and where the new duties are as distinct as those that are performed by the director of the Department of Archives and History as compensation commissioner under the Workmen's Compensation Act, it seems that the compensation of a statutory office can be increased the same as can that of a constitutional office.

It has been well said that, where an act is required to be performed, or services to be rendered, and the person required to perform same necessarily holds two positions, and provision is made by law for the payment of services rendered in each capacity, it is more consonant with the principles of justice and equity that compensation for that service should be made according to the provision of the statute that applies to it, rather than to deny such remuneration on mere technical grounds, and to require the gratuitous performance of the service by the officer.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

ACCOUNTING:—Unexpended balance of appropriation for repairs and insurance may be paid out.

February 6, 1920.

Hon. W. D. Nesbitt, Chairman.
Board of Control and Economy,
Montgomery, Alabama.

Dear Sir:

In reply to your inquiry of February 5, I beg to advise that I see no reason why the unexpended balance of the appropriation of \$2,000 under bill approved February 7, 1919, for repairs and insurance on buildings, should not be paid out. It is not affected by the provision in the general appropriation bill of 1919, re-distributing certain appropriations theretofore made.

Yours very truly,
J. Q. SMITH,
Attorney General.

LEGISLATION:—Certain acts for relief of individuals are constitutional.

February 6, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

I beg to advise that I have examined the acts passed by the Legislature of 1919 for the relief of the following individuals:

B. Ivy Burt, (Page 865).
T. H. Pearson, (page 880).
W. J. Richardson, (page 962).
Cora Rasco, (page 727).
Camp Lomax (page 732).
H. S. Brown (page 843).

For the payment of a guard incurred in bringing to the State of Alabama from Little Rock, Arkansas, one L. W. Griffith, a fugitive from justice. (Page 731).

I beg to advise that I am of the opinion that the acts authorizing the appropriations are each valid, and that in

accordance with the terms of said acts you are authorized to make the payments which they call for.

Funds in the state treasury may be used by the Legislature in any manner in which they see fit, so long as they do not violate any provision of the Constitution. I am of the opinion that in making the appropriations covered by these acts they have not violated any provision of the Constitution.

Yours very truly,
L. E. BROWN,
Assistant Attorney General.

SCHOOL SYSTEM; OFFICE HOLDERS:—Tax Adjuster may not serve on County Board of Education.

February 6, 1920.

Mrs. R. L. Faucett,
County Superintendent of Schools,
Prattville, Alabama.

Dear Madam:

I beg to acknowledge receipt of your letter of February 5, in which you ask to be advised whether or not Mr. Fair, who is now the tax adjuster for Autauga County, could serve on the board of education.

I beg to advise that under section 280 of the Constitution it is provided that no person shall hold two offices of profit at one and the same time in this state, except justices of the peace, constables, notaries public and commissioners of deeds. The office of adjuster is a state office, and Mr. Fair receives a regular salary. The office as a member of the board of education is also a state office, and by virtue of receiving five dollars a day while in session makes it an office of profit. I am therefore of the opinion that Mr. Fair could not hold these two offices at one and the same time. If he should be elected on the board of education, and accept same, it would probably vacate the office of tax adjuster.

Hoping that this is the information you desire, I am,

Very truly,
J. Q. SMITH,
Attorney General.

ALABAMA POLYTECHNIC INSTITUTE:—Trustees have absolute control over funds allowed to Institute. Supplies should be purchased through Board of Control and Economy. Legislature may attach conditions to appropriations by which the Trustees shall be bound if they accept the fund. Certain appropriations carry traveling expenses of State Veterinarian. Hog cholera appropriation may be used only for furnishing serum at cost of manufacture. Funds allotted under Smith-Lever Act should be expended as agreed between Trustees and National Secretary of Agriculture. "Quarters" for persons engaged in extension work means only temporary lodgings. Institute should obtain oil tags from the State Auditor. Officers withholding funds are chargeable with interest thereon.

February 9, 1920.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol.

Dear Sir:

Replying to your letter containing a number of inquiries relative to the expenditure of certain funds by the Alabama Polytechnic Institute and its various departments, I beg to advise as follows:

1. The management and control of the Alabama Polytechnic Institute is vested in its trustees by section 266 of the Constitution of 1901. This authority cannot be interfered with by the law-making body of the State, for the trustees and the Legislature derived their powers from the same high source. When funds become unconditionally the property of this Institution, its trustees are vested with its exclusive direction and their discretion cannot be questioned unless the purpose to which the money is applied is totally without the pale of possible benefit to the interest of the Institution. Some of the funds over which the trustees exercise such exclusive control are (1) the interest funds, (2) tuition or fees derived from students if such are collected, and (3) unconditional general appropriations for the maintenance and support of the Institution. It lies within the power of these trustees to apply such funds to the traveling expenses of its professors and officers, if such travel is in promotion of the interest of the school. The law specifically authorizes the traveling expenses of the State Chemist, and this office is advised that it has been the custom for years for those administering these funds

to allow traveling expenses of other officers and teachers connected with this Institution. It is an elementary rule that in case of doubt the construction given by those charged with the execution of a law for a long period should be upheld unless such construction is expressly violative of the spirit of the statute. Under like constitutional provisions of other States such expenses have been held to be within the unrevisable discretion of the trustees.

Political Code of Alabama, 1907; Sec. 46;
Regents v. Auditor General, 167 Mich. 451;
People v. Regents of University, 4th Mich. 98;
Shepard v. Sartain, 185 Ala. 439.

2. The Act creating the Board of Control and Economy confers on that Board distinctly different duties in regard to entirely educational institutions from that given over eleemosynary and charitable institutions. The terms "eleemosynary and charitable institutions" do not necessarily include educational institutions in the common acceptance of the meaning of these terms, and section 14 of the Act, which is in the nature of a proviso modifying the general powers of the Board relative to entirely educational institutions, specifically excepts educational institutions from being included in the terms "eleemosynary and charitable institutions" as used in this Act. The Board of Control and Economy is vested with the powers of a purchasing agent only of educational institutions. It is the proper Board through which should be purchased all supplies for the Alabama Polytechnic Institute and for each of the departments and activities under its supervision or control. In this board is also vested the duty of insuring all properties of that Institution.

The provision of the Act charging the Board of Control and Economy with the duty of insuring the property and acting as the purchasing agent of the Alabama Polytechnic Institute, does not conflict with the constitutional rights of its trustees. The trustees have power and control over all policies of the Institution, and direct the purposes to which the funds subject to their exclusive control shall be devoted, but when funds are devoted by the trustees to the purchasing of supplies, the purchasing of such supplies devolves on the Board of Control and Economy. The Legis-

lature has the authority to compel what it deems a more efficient administration of funds by providing that such purchasing shall be done by an expert Board.

Acts 1919, p. 43, secs. 5, 12, 14 and 15, pp. 1117;
Mobile School Commissioners, 44 Ala. 506;
Railway Co. v. Kennerly, 74 Ala. 583.

3. To better effect the purpose and intent of section 266 of the Constitution of 1901, the Alabama Polytechnic Institute is made a body corporate with such powers as are necessary to the promotion of its creation. Like other corporations, the acts of its directors (trustees) should be recorded. Where public funds are appropriated with the condition that such funds should be spent under the direction of a Board, it means that such Board shall direct the purpose for which and the manner in which the funds are spent. Without their order or direction there is no legal expenditure. That the better practice requires this order to appear on the minutes of the Board cannot be questioned. To allow the handling of moneys, secured by burdening a people with taxation, to rest in parole is too loose and lax a method to appeal to those who pay the tax and who believe that such a trust imposes a high degree of responsibility. However, there is no law specifically compelling this record to be made, and for this reason we hesitate to hold that the Courts would decide such a record necessary to the legality of an expenditure. The failure, however, of the minutes to show an order directing the expenditure of such funds is *prima facie* evidence, at least, that there was no authority to make the expenditure, and places the burden of establishing proper authority for such expenditure on those making them.

Political Code, 1907, secs. 1899 to 1911, inclusive;
Hill v. Cameron et al, 194 Ala. 385; 69 Sou. 640.

4. Although the Constitution places the independent control of the Alabama Polytechnic Institute in its trustees, the Legislature may in making appropriations for the support of its various activities attach such conditions to appropriations as it deems wise and expedient. The trustees may accept or reject such appropriations, but if the fund is

accepted the condition attached thereto is also accepted. The trustees under whose direction such funds are spent, are charged with strictly and faithfully applying them solely to the purposes for which the fund was appropriated. The appropriation for the purpose of conducting in different counties of the State, experiments for eradicating the cattle tick, for building a laboratory to manufacture anti-cholera serum, and for the promotion of horticulture (about which you inquire), are of this character, requiring the funds secured thereunder to be used for the purposes provided in the Act. Any expenditure not included within the intent of such act is illegal. The legality of such expenditure depends on whether it is within the reasonable range of the purpose of the Act, and in determining this the circumstances and objects of the expenditure must be considered. When a wide discretion is lodged in a board relative to the application of certain funds, doubts as to whether it is within the intent of the statute are required to be resolved in favor of the legality of the expenditure.

11 Corpus Juris 986; Acts 1911, p. 5;

Acts 1915, pp. 104, 924;

Weinberg v. Regents, 97 Mich. 254;

Sterling v. Regents, 110 Mich. 382.

5. The Act approved February 9, 1911 (Acts 1911, p. 5), appropriates funds to the experiment stations of the Alabama Polytechnic Institute to conduct in as many of the counties of Alabama as advisable and practicable with the funds provided, experiments to acquire agricultural information on certain subjects, and to publish and disseminate the results. Other portions of the Act show that the dissemination of the results was to be to the farmers of Alabama. All duties required by this Act are within the State, and it is difficult to find any intent on the part of the Legislature to devote any of the funds appropriated by this Act to the payment of traveling expenses without the State. The statute does not contemplate that any part of this appropriation should be arbitrarily used to raise the salary of the director of the experiment station. This would be vesting in a person the partial authority to raise his own salary, as the appropriation is spent on the recommendation of the director of the experiment station. If, however, the trus-

tees impose on the director extra duties in the administration of the law and in preparing the circulars anticipated by the Act, and for such extra duties allow a compensation, such compensation would doubtless be a proper charge against the \$2500 allowed to general administration expenses.

6. The State Veterinarian is charged with certain duties in connection with the livestock sanitary board which require him to travel to various parts of the State. As the law provides that he shall receive his expenses while on active duty, an expense for traveling within the State while on active duty, would be a legitimate charge against the funds appropriated to the livestock sanitary board for its maintenance and support. It would also be a proper charge against a fund appropriated by the Act of 1915, for the eradication of the cattle tick, as that appropriation is made a part of the Code provisions relative to the livestock sanitary board. If a trip without the State was necessary to accomplish the eradication of the cattle tick, it would be within the discretionary power of the livestock sanitary board to allow the payment of such expense.

Political Code 1907, section 767;
Acts 1915, p. 204.

7. (a) The appropriation made by the Act approved March 5, 1915, (Acts 1915, p. 104), is for the exclusive purpose of (1) building and equipping a laboratory for making serum or virus with which to immunize hogs against cholera, (2) to extend and add to such laboratory any needed buildings, (3) to renew such apparatus and things necessary to the proper conduct of the laboratory, and (4) to distribute such serum to the residents of Alabama at cost. Thus it clearly appears that no traveling expenses of anyone, nor any part of the State Veterinarian's salary is a legitimate charge against the funds secured under the appropriations of this Act.

(b) The greatest moving purpose of this Act was to furnish anti-cholera remedy to the farmers of the State at the cost of manufacturing. It is a violation of the heart of the legislative intent for the parties entrusted with the duties of conducting such work to commercialize the serum business by the purchasing of serum from other manufac-

turers and selling it to the farmers at a profit. Such acts are unauthorized.

(c) The appropriation under this Act, both for the building and equipping, and for the maintenance of the laboratory should not have been drawn out of the State Treasury except when needed. If there was any of the fund derived from this appropriation on hand at the end of the fiscal year, it is prima facie evidence that it was drawn before it was needed, and therefore improperly drawn. Such funds should be returned to the State Treasury.

8. (a) The first purpose of the appropriation made by the Act approved September 25, 1915 (Acts 1915, p. 624), is to secure the benefit of the Federal funds arising from what is known as the Smith-Lever Act. The Smith-Lever Act provides that the "work shall be carried on in such a manner as may be mutually agreed upon by the Secretary of Agriculture and the State Agricultural College or colleges receiving the benefits of this Act." Before these Federal funds are available, the state must by its Legislature assent to the provisions of the Smith-Lever Act and appropriate an equal sum to that granted by the Federal Government for the purposes set forth by the Smith-Lever Act. In accepting the terms of the Federal Act, the Legislature thereby consented for this work to be carried on as mutually agreed between the Alabama Polytechnic Institute and the National Secretary of Agriculture. Whether or not the expenditures have been made in accordance with this agreement, is a question of fact and not of law. Only so much of the fund as was necessary to match the federal appropriation is subject to this condition, and that portion above this needed amount is subject to the conditions imposed by the Legislature. The Act places this balance of the fund under the general discretion of the trustees of the Alabama Polytechnic Institute to be used by it for "any expenses whatever relevant" to promoting the various purposes enumerated in this statute.

I am of the opinion that under the terms of this Act, the trustees were vested with authority to authorize expenses for trips without the State, if in their discretion they deemed such trips conducive to accomplishing the general purposes of the law.

(b) The "quarters" authorized to be furnished by section a of this act is "quarters" for "the persons engaged

in extension work in Alabama," and not office quarters for operation of the work. One of the definitions of the word "quarter" given by Webster's International Dictionary is "to supply with temporary lodging, to assign to a certain place of shelter as a soldier." The word as used in this Act means to furnish with temporary quarters. It could not mean purchasing a home for those engaged in this work. We know that the persons engaged in this work are constantly changing. It authorized providing temporary lodging only.

9. The State Auditor is the only person authorized to issue oil tags. To secure such tags the Alabama Polytechnic Institute is required to make requisition through its accredited agent on the Auditor for the number needed to supply the estimated demand. The Auditor is required to keep a correct account with this institution, charging it the price of one-half cent for each gallon of oil printed on such tags. Any oil tags secured by the Alabama Polytechnic Institute from any other source or any other manner than this statutory prescribed method, is unauthorized and illegal.

The law creating the Board of Control and Economy does not make any change in the method of securing oil tags by the Alabama Polytechnic Institute. The price the Institution is charged for the tags is fixed by the statute and no discretion enters into the transaction except that used in estimating the number of tags probably needed. Repeal by implication is not favored, and there is no clear purpose of changing the modus operandi of securing oil tags by this Institution in the law conferring on the Board of Control and Economy its power.

Herr v. Seymour, 76 Ala. 270;

Birmingham v. Southern Express Co., 164 Ala. 529.

10. The failure of any officer or other person to report and pay over funds to the State Treasury as required by law, makes such person chargeable with interest on such funds. Any person illegally withholding funds from the Treasury is chargeable with interest thereon.

Bullock v. Governor, 2d Porter 484.

Very truly yours,

HARWELL G. DAVIS,
Assistant Attorney General.

SOLICITORS:—Solicitor's fees collected and paid into county treasury and salary paid to solicitor therefrom.

February 9, 1920.

Hon Henry D. Moorer, Solicitor,
Bay Minette, Alabama.

Dear Sir:

I beg to acknowledge receipt of your letter of February 1, in which you ask to be advised as to how the solicitors' salary provided for in Local Acts of the last Legislature, page 137, should be paid.

I am of the opinion that the fees of the solicitor should be collected by the clerk of the Circuit Court, who is ex-officio clerk of the County Court, and that he should pay these fees into the county treasury, and they should be drawn out by you as provided in said act. If you will notice the reading of the act, instead of fees due you, it provides a direct salary. If there is an amount to exceed \$900.00 in the hands of the treasurer, after you have been paid \$75.00 per month that amount is retained, of course, by the treasurer, for other purposes, as provided for by law.

Very truly,
J. Q. SMITH,
Attorney General.

POLL TAX EXEMPTION:—Exemption under section 194½ of Constitution does not apply to soldiers until after discharge.

February 13, 1920.

Hon. Thos. W. Coleman, Jr.,
Judge of Probate,
Anniston, Ala.

Dear Sir:

The Governor referred to the Attorney General's office your letter of the 6th instant, with reference to the exemption of soldiers from the payment of poll taxes.

As I understand the section of the Constitution involved, being section 194½, shown in Acts of the Legislature, 1919, page 724, the amendment applies only to a soldier "who has been or may be honorably discharged from said service." Under the facts as stated in your letter, it seems

to me that the soldier referred to would not be entitled to certificate until discharged from the service, and that after such discharge he will be entitled to the exemption until September 30, 1923, provided he shall be discharged prior to that date. '

Very truly yours,
J. Q. SMITH,
Attorney General.

INSURANCE:—Under Revenue Act of 1919 both foreign and domestic insurance companies may claim credit on account of business re-insured in a company authorized to do business in Alabama.

February 13, 1920.

Hon. A. W. Briscoe,
Commissioner of Insurance.
Capitol.

Dear Sir:

Inquiry: Foreign insurance companies are required to pay a certain per cent on the gross premiums received by them for business done in this state. In calculating the amount of the gross premium, does the law authorize allowing a credit of the cost of re-insuring in, or rather ceding to, another company which is authorized to do business in this State, and which pays the required per cent on the premium received on the said insurance?

The answer to this inquiry depends on whether or not both foreign and domestic insurance companies, or only domestic companies, are affected by the following provision:

"And no credit or reduction of any kind shall be allowed on account of the cost of re-insurance taken by such company in a company not authorized to do business in this state." (Acts 1919, p. 414-415.)

The section containing this provision deals with both foreign and domestic companies. A cursory reading of this section is most liable to impress one with the idea that this provision relates only to domestic insurance companies,

as the clause it immediately follows deals with domestic companies, and as a rule the word "such" refers to the last antecedent.—*Commonwealth v. Riley*, 210 Mass. 387.

A careful study of the section reveals that the provisions immediately following the clause under consideration refer to all insurance companies; that in the entire section, whenever a provision is limited to either domestic or foreign companies the specific word "domestic" or "foreign" is used, and whenever "such companies" occurs, it means insurance companies and is not limited simply to the specific character of the company immediately preceding the term "such companies." This use of this distinctive designation is recognized in the same sentence containing the provision under consideration.

There are other reasons supporting this conclusion. The clause under consideration was first contained in the act of 1911 (Acts 1911, page 163), and related to both domestic and foreign insurance companies. Its phraseology was somewhat changed by the act of 1915 (Acts 1915, page 506), but both the departmental and the Attorney General's construction held it still to apply to all insurance companies. The present statute (Acts 1919, page 413) is virtually the same as that contained in the act of 1915, except for a change in punctuation, and the insertion of an extra provision not relating to the matter under consideration.

It is always presumed that the Legislature never intended to make any alteration in the law beyond what it has explicitly declared in express terms or by unmistakable implication. When the statute is susceptible of more than one meaning it will be construed so as not to effect a change in the law, even though it contains new provisions, and it becomes necessary to depart from the rules of grammatical construction and punctuation.

Endlich on Interpretation of Statutes, p. 151, sec. 113.

Ex parte Lawler, 185 Ala. 428; 64 South. 102.

Cole v. Sloss-Sheffield Steel Co., 186 Ala. 192, 65 South, 117.

Jones v. State, 10 Ala. App. 152, 65 South. 411.

Landford v. Dunklin, 71 Ala. 594.

It is very improbable that the law-makers would alter an established just policy so as to work an injurious discrimination against those companies complying with the law of this state. This would be the practical effect of requiring both companies to pay a tax on the premium where the company taking the business cedes it to another company authorized to do business in this state.

Endlich on Interpretation of Statutes, p. 343, sec. 258.

Worthen v. State, 189 Ala. 395, 66 South. 686.

The provision under consideration has been held by implication to entitle companies to credits for ceded business where such business is re-insured with companies authorized to do business in this state. This has been the practice of the Insurance Department. In statutes of doubtful meaning the departmental practice and the Attorney General's construction will be given considerable weight in determining the intent of the law-makers.

Endlich on Interpretation of Statutes, p. 505, sec. 360.

Union Insurance Co. v. Hoge, 21 How. 35.

United States v. Graham, 110 U. S. 219.

United States v. Johnson, 124 U. S. 236, 31 L. ed. 389.

State v. Board of School Commissioners, 183 Ala. Ala. 554. 63 South. 76.

Macon County v. Abercrombie, 184 Ala. 283, 63 South. 985.

Shepherd v. Sartain, 185 Ala. 430, 439; 64 South. 57.

It is my opinion that the clause prohibiting a credit on account of the cost of business reinsured in companies not authorized to do business in this state relates to both foreign and domestic insurance companies, and that this provision, by implication, allows both foreign and domestic insurance companies a credit on account of business reinsured in a company authorized to do business in this state.

This ruling is limited to schedule 59 of section 361 of the present revenue act, and has no application to what is

known as the Fire Marshal Act (Acts 1919, p. 1013), as this latter act contains no provision which either expressly or by implication authorizes such credits. Such credits should not be allowed under the Fire Marshal Act in estimating the amount of premiums on which insurance companies should pay the required per cent.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

POLL TAX EXEMPTION:—Certificate of exemption is not to be issued by Election Commissioner, but only under regulations prescribed by the Governor.

February 14, 1920.

Hon. Joseph R. Tate,
Solicitor,
Birmingham, Ala.

Dear Sir:

I have your letter of the 11th instant, enclosing copy of your letter to Judge Stiles dated February 10th, and am also in receipt of joint letter of Judge Stiles and yourself to me, dated February 11th, with reference to the issuance of certificates of exemption to soldiers.

I think the position in your letter of February 10th to Judge Stiles is correct.

Acts 1919, p. 724, with reference to the constitutional amendment providing for such exemptions, provides that certificates of exemption from payment of poll taxes shall be issued to persons entitled thereto *under regulations prescribed by the Governor*. I am of the opinion that the designation of some person to pass upon applications for such exemptions and to issue certificates thereof is a part of the regulations for the issuance of such certificates. I do not think there is anything in Acts 1915, page 239, and the Acts of 1919, page 687, amending the Acts of 1915, which has the effect of conferring upon the election commissioner power to pass upon such applications and issue such certificates to the exclusion of the power conferred upon the Governor to prescribe the regulations under which such certificates shall be issued. There is in fact no provision in any of the Acts referred to on this particular subject other

than clause (b) of section 194½, which prescribes that the certificates shall be issued under regulations prescribed by the Governor. You will note in this connection that the Act with reference to the constitutional amendment (Acts 1919, p. 724) was approved September 26, 1919, while the Act with reference to the election commissioner was approved on the preceding day or September 25, 1919.

I do not think it necessary to go into the question as to whether all of the provisions contained in the Act of 1919 with reference to the duties of the election commissioner, are cognate to the title of the Act, for the reason that, in my opinion, there is nothing in said Act in conflict with clause B above referred to. I am inclined to the opinion however, that it would be held that the provisions of the Act concerning the election commissioner fall within the scope of the title of the Act.

It is true that the Act with reference to the duties of the election commissioner provides that he is a judicial officer and shall act judicially in all matters pertaining to the *registrations of applicants*. The issuance of the certificates, however, does not pertain to the registration of the applicant, and it is necessary, as I understand it, for a soldier to whom such certificate has been issued to afterwards register his name with the commissioner of elections, that is to say, the election commissioner acts judicially in such matters as pertain to registration, but he does not so act, and in fact is given no authority to act in the matter of issuing such certificates of exemption any more than he is given authority to collect poll taxes and issue receipts therefor, which duty the tax collector is required by law to perform.

Section 37 of the Act with reference to the duties of the election commissioner provides that "all of the duties now or which may hereafter be required *by law* to be performed by the probate judge of said county in reference to the *registration of voters* and all other duties now or hereafter conferred *by law* upon the probate judges of said counties *in reference to elections*, excepting the naming of election officers," shall be performed by the election commissioner. The issuance of certificates of exemption does not relate to the registration of voters or to the holding of elections, and the issuance of such certificates is not required by

law to be performed by the probate judge, nor is such duty conferred by law upon the probate judge, as the Act with reference to the constitutional amendment provides that the certificates shall be issued *under regulations prescribed by the Governor*. In other words, it is discretionary with the Governor as to whom he will designate to pass upon application for such certificates and to issue such certificates. He could have designated, if he saw fit to do so, the tax collector, who if such soldiers were not exempt from the payment of poll taxes, is required by law to give to all persons paying poll taxes a receipt which entitles the holder thereof to be registered upon the list of voters, if in other respects qualified as a voter and such person is not already registered as a voter.

You call attention to the provision in section 37, Acts 1919, p. 689, requiring that the election commission shall sit at his office at the court house for such time between the first day of February and the first day of October of each year as may be necessary to make a complete registration of all persons entitled to register. Note, however, the provision appearing upon page 688 of Acts 1919, to the effect that the Board of county commissioners or Board of like authority may authorize the registrar to sit at the county seat and register qualified voters at any time except within the sixty days immediately preceding any primary, or general election.

Yours very truly,
J. Q. SMITH,
Attorney General.

REGISTRATION AND ELECTIONS:—Duties of Election Commissioner include those of registrar and all those of probate judge with regard to registration and elections except naming election officers. Election Commissioner may register at any time except within 60 days immediately preceding primary or general election.

February 18, 1920.

Hon. J. P. Stiles,
Judge of Probate,
Birmingham, Ala.

Dear Sir:

I have your letter of the 17th instant.

In reply to your inquiry as to whether the Act referred to in your letter is unconstitutional, will state that inasmuch as it appears on its face to be constitutional, and there is no obvious or patent defect about the Act which would render it unconstitutional, I would not undertake to hold that the Act is unconstitutional. If any doubt is entertained as to the constitutionality of the Act I would prefer that it be tested by a legal proceeding, in order that the Court may pass upon the question.

You also ask whose duty it is now under the law to check the poll list and to make and certify the list of qualified voters, which has heretofore been performed by the probate judge, and if there is anything in the Act to take that duty away from the probate judge, or if the duty is now required of the election commissioner?

As I understand sections 34 to 37, both inclusive, of the Act, in counties having more than 100,000 population, as shown by the last preceding census, an election commissioner is provided for in lieu of a registrar, and it is the duty of such election commissioner to perform all duties which would devolve upon the registrar in other counties; also to perform "all of the duties now or which may hereafter be required by law to be performed by the probate judge of said counties in reference to the registration of voters, and *all other duties* now or hereafter conferred by law upon the probate judge of said counties in reference to elections, excepting *the naming of election officers.*"

It therefore appears to me that all of the duties referred to by you in your letter in counties of the population referred to, devolve upon the election commissioner, and that the only duty resting upon the probate judge in connection with elections is the naming of election officers.

Section 37 provides that the election commissioner shall sit at his office at the courthouse for such time between the first day of February and the first day of October of each year as may be necessary to make a complete registration of all persons entitled to register. It is also provided in this section that the election commissioner shall perform all of the duties now required by law to be performed, or hereafter required by law to be performed by the registrar.

It is also provided on page 688 of the Act referred to that the Board of County Commissioners, or board of like

authority, may authorize the registrar to sit at the county seat to register qualified voters at any time except within the 60 days immediately preceding any primary or general election. It would appear that, inasmuch as any election commissioner is required to perform the duties of the registrar, the provision last above referred to would also apply to the election commissioner, although I think there may be some doubt as to this. It may be that it was the intention that the election commissioner should register only between the first day of February and the first day of October of each year, but according to my view of the matter, he is not limited to this time, and he may be authorized to sit at the county seat and register at any time except within 60 days immediately preceding any primary or general election.

Yours very truly,
J. Q. SMITH,
Attorney General.

REGISTRATION:—An obviously arbitrary classification made for the purpose of enacting a local law in the guise of a general law renders the act unconstitutional. The fact that it applies to only one county does not of itself make it local, if classification is reasonably related to the purpose to be effected.

Hon. Chas. E. McCall, February 19, 1920.
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

Although contained in different communications, the inquiries hereinafter set out involve the same legal principles, and I am taking the liberty of answering them together.

The inquiries are as follows:

(1) Are the following laws valid enactments:

Act approved Sept. 20, 1919, Senate Bill 230, (Acts 1919, p. 531);

Act approved Sept. 20, 1919, Senate Bill 232 (Acts 1919, p. 531);

Act approved Sept. 24, 1919, House Bill 937 (Acts 1919, p. 686);

Act approved Sept. 30, 1919, House Bill 890 (Acts 1919, p. 867).

(2) If these laws are not directly attacked, and the county treasurer pays out county funds under such laws, can the same afterwards be charged to such treasurer?

All of the acts in question are limited in their application to counties whose population falls within a fixed maximum and minimum number, and examination of the legislative journals discloses the fact that no notice was given, as required by section 106 of the Constitution, as a prerequisite to the enactment of local laws. It becomes necessary, therefore, to determine whether these laws are local or general.

In the recent case of *Reynolds v. Collier*, in MS., the Supreme Court said:

"The effect of all of our decisions, in short, has been that where there is a substantial difference in population, and the classification is made in good faith, reasonably related to the purpose to be effected and to the difference in population which forms the basis thereof, and not merely arbitrary, it is a general law—although at the time it may be applicable to only one political subdivision of the State, but that if the classification bears no reasonable relation to the difference in population, upon which it rests, in view of the purpose to be effected by such legislation, and clearly shows it was merely fixed arbitrarily, guised as a general law, and, in fact, it is a local law, it is then in plain violation of the Constitution and cannot be upheld. * * * * *

"There can be no pretense whatever either of logic or common sense why in those counties under twenty-five thousand population, and yet lacking one hundred and fifty or two hundred population of coming within the figures as arbitrarily fixed by this Act, the county court judges should still receive only three hundred dollars per annum (Acts 1915, p. 603), while in this particular county the judge of the county court should receive six hundred dollars additional. The classification as to population has not the semblance of necessity, reason, or substantial merit, upon which to stand. It was merely arbitrarily fixed so that under the guise of a general law this local legislation was enacted."

The act approved September 20, 1919, Senate Bill 230, and the act approved September 20, 1919, Senate Bill 232 (Acts 1919, p. 531), are both made applicable only to counties "having a population of more than 37,900 and less than 38,000, according to the 1910 Federal census or any subsequent census, where the assessed value of the real and personal property of such counties exceeds \$10,000,000."

Like the act declared a local law in the Grady Reynolds case, *supra*, these two acts have a classification as to population fixed at the narrow margin of one hundred. An examination of the Federal census shows that only the County of Talladega is affected by this law.

Not only does this act limit its operation by a narrow margin of population, but it further requires that the assessed value of the property in the county be over ten million dollars. This latter provision would prevent the law from applying to all counties falling within the classification by population (if there were such other counties), unless the county also had the required assessed valuation.

These two laws provide respectively for the payment of ex-officio fees of sheriffs and of clerks of the circuit court in such counties. The classification is undoubtedly an arbitrary one, made for the purpose of enacting a local law in the guise of a general one. The acts are therefore unconstitutional and void.

State ex rel Saltsman v. Weakley, 153 Ala. 648.
Reynolds v. Collier, in MS.

The act approved September 30, 1919, House Bill 890 (Acts 1919, p. 867), fixes the salary of deputy solicitors in counties having a population of not less than 26,940 and not more than 27,000.

A narrower margin of classification is used in this act than in those just considered. The act applies only to Shelby county, and an examination of the census shows that a varying of either the maximum or the minimum number of population used in this classification by a few hundred inhabitants would have included other counties in the state. Under the authorities hereinbefore cited this act must be considered a local law. As the notice required by section

106 of the Constitution was not given, the act is void and of no effect.

Larkin v. Simmons, 155 Ala. 273.
State v. Sayre, 142 Ala. 641.

The act approved September 24, 1919, House Bill 937 (Acts 1919, p. 686), applies to counties of not less than 53,401 and not more than 58,501 population, which classification includes only Dallas county, and provides for the payment of fifty dollars per month to the sheriff for the expenses of the use of automobiles used in the discharge of his duties.

It will be observed that a much wider margin is allowed in the classification made by this statute than in any of the others considered. The fact that it applies only to one county does not of itself make it a local law. It can be a local law in effect by applying to only one subdivision of the state, and still be a general law in theory and within the meaning of the Constitution.

State v. Bugg, 196 Ala. 460.
Board v. Johnson, 76 South. 859.

Whether there is a reason why sheriffs of such counties as Dallas should receive fifty dollars per month for automobile expense, while counties with a few thousand more or less inhabitants receive no remuneration for such expenses, so as to justify creating a classification that includes only Dallas, is not necessary to decide, as the law, even if valid, cannot apply to the present incumbent. This law clearly increases the compensation of the sheriff six hundred dollars per year. To hold that it applied to the present incumbent would make it violate the Constitution of this State. (Sections 68 and 281, Constitution of 1901.)

An act which violates the Constitution is void. "A void thing is no thing; it has no legal effect whatsoever, and no rights whatever can be obtained under it or grow out of it. In law it is the same thing as if the void thing never existed."

The paying out of county funds under an unconstitutional act is the same as paying out funds without any act, so

far as civil liability is concerned. An unconstitutional and void act can furnish no protection to any one.

Norwood v. Goldsmith, 168 Ala. 224, 53 South. 34.
Mobile County v. Williams, Judge, 180 Ala. 639, 61
South. 963.

City Council of Montgomery v. Reese, 149 Ala. 188,
43 South. 116.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

COUNTY EXPENSE; COURT OF COUNTY COMMISSIONERS:—

Court of County Commissioners may make contract with attorney for legal services not included in duties of solicitor, and may pay such attorney a monthly salary.

February 20, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

This office is in receipt of your letter which encloses a contract and inquires as to its validity. The question presented is as follows:

“Has a court of county commissioners authority to retain, at a monthly salary, an attorney to represent the court in all matters in which they are empowered to hire an attorney? The contract under consideration provides for its termination upon ten days notice.”

The power of courts of county commissioners was dealt with in an opinion rendered by this office on October 20, 1919, which held that the commissioners could not create new and permanent offices, such as that of legal adviser at a regular monthly salary.

The contract now under consideration differs in several essentials from the one under consideration in that opinion. This contract creates no permanent office, as it may be terminated by the commission on ten days notice if they see that sufficient matters are not arising to justify the pay-

ment of the retainer. Furthermore, this contract is limited to those matters in which the court of county commissioners has power to employ attorneys and is not for the purpose of securing legal advice, a duty devolving on the solicitor. The opinion of October 20th, *supra*, should perhaps be limited to the contract then under consideration.

As to all matters properly appertaining to a county, it has the same power to contract and be contracted with as an individual (*Montgomery County v. Barbour*, 45 Ala. 242); and by virtue of the right to sue and be sued, a county has authority to employ attorneys.

Code of Alabama of 1907, section 123.

Jack v. Moore, 66 Alabama 184.

The Supreme Court of Alabama has recognized the right of a court of county commissioners to retain an attorney during a certain period, pertaining to building roads, at a fixed quarterly salary.

Lindsey v. Colbert Co., 112 Ala. 409.

If in the opinion of the court of county commissioners they deem it to the best interest of the county to retain an attorney to represent the county in anticipated litigation, in which litigation when actually begun the court would be empowered to employ an attorney, I am of the opinion that good business would require the court to do so, and that it has the power to make such contract, and this power to employ carries the right to fix the amount and time of payment for such services.

The contract now under consideration creates no permanent office. It simply does what most successful business men do when anticipating litigation; that is, retain an attorney whom they deem best fitted to handle the matter.

I am of the opinion that the court of county commissioners was authorized to execute the contract for the purpose and in the manner set out in the copy of such contract submitted with your inquiry.

Yours very truly,

J. Q. SMITH,
Attorney General.

STATE HEALTH DEPARTMENT:—Acts of county board of health are not subject to review by county medical society; but the county board of censors is accountable to the county medical society, though composed of same members as county board of health.

February 20, 1920.

Hon. S. W. Welch,
State Health Officer,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of February 19th, containing the following inquiry:

1. Are the acts of the County Board of Health subject to review by the County Medical Society?
2. Did the act of September 29, 1919, make any change relative to the authority of the County Medical Society to review the acts of the Board of Censors of the County Medical Society?

Under section 700 of the Code of 1907, the County Medical Societies were the County Boards of Health. This section was amended by section 3 of an Act approved September 29, 1919 (Acts 1919, p. 909). This amendment constituted the Boards of Censors of the County Medical Societies the County Boards of Health, instead of the County Medical Societies, thereby divesting the County Medical Societies of all authority and power formerly exercised by them as the County Boards of Health, and vesting it in the Boards of Censors of the County Medical Societies.

There is no provision of law which either expressly or by implication makes the acts of the County Boards of Health subject to review by the County Medical Societies. A consideration of the laws relating to this question conclusively convinces that the County Medical Societies have no such power or authority.

The amendment constituting the Board of Censors of the County Medical Society the County Board of Health makes no change in the relation of the Board of Censors and the County Medical Society. The personnel of the Board of Censors act in a dual capacity, as a Board of Censors and as a County Board of Health. When acting as a Board of Censors the authority of the County Medical Society over such acts is not changed by the amendment, but when act-

ing as a County Board of Health their acts are not subject to review by the County Medical Society.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

ROADS:—Under Act of 1919, page 894, section 8½, counties are to have the benefit of Federal aid on all projects on which construction work had not been commenced prior to approval of act.

February 24, 1920.

Hon. John A. Rogers,
Chairman, State Highway Commission,
Bell Building, Montgomery, Alabama.

Dear Sir:

I have your letter of the 24th instant.

As I construe section 8½ of act approved September 30, 1919 (Acts 1919, p. 894), referred to in your letter, the work referred to is the work of actual construction.

As I construe the act, it was the intention of the Legislature that counties should get the benefit of Federal aid in all projects in which construction work has not been commenced prior to the passage of the act.

Yours truly,
J. Q. SMITH,
Attorney General.

CONVICTS; COST BILL:—Where convict elected to serve pending appeal, case was reversed, new indictment returned, and conviction had on second trial, the bill of costs in the second trial is properly chargeable against the convict fund.

February 24, 1920.

Hon. Cleon B. Rogers,
State Warden General,
Capitol.

Dear Sir:

Your letter of the 20th of this month presents the following state of facts:

John Harris was convicted for murder in the second degree, and sentenced to ten years in the penitentiary. The

clerk of the trial court prepared a bill of cost, which was paid by your department. Mr. Harris had elected to serve his sentence pending an appeal, and had been delivered to the officials of the penitentiary. The case was reversed, the first indictment quashed, and a new indictment returned, upon which he was convicted and sentenced to the penitentiary, where he now is. The clerk of the trial court presents another bill of cost. The question presented is whether the second bill should be paid.

The last bill presented is a proper charge against the convict fund, for all conditions required by the statute to make it a legal charge exist, to-wit: the defendant was convicted and sentenced to the penitentiary (Code section 6572), he has been delivered to the penitentiary officials, and the clerk has forwarded the bill of cost to your department, which bill the clerk makes oath is correct, and is a legal charge against the defendant (Code section 6575). The correctness of the payment of the first bill of cost has been pretermitted, for whether the first bill was properly or improperly paid cannot affect the status of the last bill.

Yours very truly.

J. Q. SMITH,
Attorney General.

LEGISLATION; CONSERVATION LAWS:—Conservation law of 1907 (page 192) is in all respects constitutional. Court of county commissioners may appropriate money for salary of county forest warden.

February 24, 1920.

Hon. John H. Wallace,
Commissioner of Conservation,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 24th instant, to which you attach letter from Hon. J. G. Peters, Acting Chief, Branch of Forest Management, Eastern Division, to you, dated February 21, 1920.

I have examined the Act "To provide for the protection of the forests of Alabama," etc. (Acts Special Session 1907, p. 192), approved Nov. 30, 1907. I am of the opinion that the act is in all respects constitutional.

You refer particularly to section 9 of the act, which confers authority on the court of county commissioners to appropriate money for the purpose of paying the salary of forest wardens of the county. It was clearly within the power of the Legislature to confer the authority referred to upon the court of county commissioners, and in my judgment there can be no question as to the constitutionality of this section, or as to any provision contained in the act.

Yours truly,

J. Q. SMITH,
Attorney General.

COUNTY COURTS; COST BILLS:—Costs in county courts when case is unsuccessful may be paid from fine and forfeiture fund if there is a surplus available.

February 24, 1920.

Hon. W. H. Cantrell,
Clerk of Circuit Court,
Hamilton, Alabama.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 18th instant.

Under the provisions of section 6889 of the Code of 1907, and the decision rendered by the Supreme Court in the case of McPherson v. Boykin, 76 Ala. 602, I am of the opinion that there is no provision for the payment of officers' costs in the kind of cases referred to in your letter from the fine and forfeiture fund.

It will be noted, however, that the act of 1919, page 1030, contains the following provision:

"The fees of witnesses, clerks, and sheriffs in all cases where no conviction is had shall be governed by the provisions of law applying to similar services in the circuit court or in preliminary proceedings."

As I construe the extract from the statute as above quoted, costs incurred in cases in county courts in which a case is not made out or in which a nolle prosequi is entered, may be paid out of the fine and forfeiture fund under the provisions of section 6889 of the Code, provided there be a sur-

plus fund out of which payment can be made, as is provided for in said section.

Yours truly,

J. Q. SMITH,
Attorney General.

BOARD OF CONTROL AND ECONOMY; COAL TONNAGE TAX; STATE INSTITUTIONS:—Coal dealers not entitled to withhold two per cent tax or make deduction for coal furnished for State institutions.

Hon. W. D. Nesbitt, February 25, 1920.
Chairman Board of Control & Economy,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of February 17, in which you ask to be advised as to whether or not you should pay the coal dealers two cents a ton on their bill where you buy coal for the state institutions, and you wish to know if it would be proper for the coal dealers to furnish coal to state institutions without adding two cents per ton, and when the dealer makes his report of coal mined, deduct the number of tons furnished to the state and its institutions.

I beg to advise that I know of no provision of law under which the coal dealer would be justified in withholding the two cent tax and making a deduction for the number of tons furnished to the state and its institutions. To carry out this plan there would have to be a specific provision of law, and the act levying a coal tax does not make any such provision.

Very truly,

J. Q. SMITH,
Attorney General.

CONVICTS; JAILS; TRANSFER OF PRISONERS:—Costs of removing prisoners under section 7206 of Code may be paid under section 6638.

Hon. Thos. E. Kilby, February 27, 1920.
Governor,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of February 27, enclosing letter from T. W. Russell, sheriff of Monroe

County, with reference to removing certain prisoners from Monroe County to the Montgomery County jail and to the county jail at Evergreen, and you ask to be advised whether or not this amount should be paid by the State.

These prisoners were removed under section 7206 of the Code, which is as follows:

"7206. Removal of prisoners from one jail to another.—If the jail of any county is destroyed or becomes insufficient or unsafe, or any epidemic dangerous to life is prevalent in the vicinity, or there be danger of rescue or lawless violence to any prisoner, any circuit judge, or the judge of the city or the county court of the county may, on the application of the sheriff, and proof of the fact, direct the removal of any prisoner or prisoners to the nearest sufficient jail in any other county; and it is the duty of such judge, in such case, to make an indorsement on the order of process of commitment, stating the reason why such removal is ordered, and to date and sign such indorsement."

Having been removed under the above section of the Code, it then devolves upon the county, when the proper certificate of the judge is presented, to pay the expenses as provided in section 6638 of the Code, as set out in the next to the last paragraph of said section, which is as follows:

"For removing any prisoner in cases where there is no jail in the county in which the offense is committed, or the jail therein is insecure, to the jail of another county, and for returning him to the jail of the county from which he was removed, or to court for trial, three dollars for himself or his deputy acting in his stead, and two dollars for each guard for each day they are respectively engaged in such removal, together with the actual necessary traveling expenses of himself or deputy, and guard or guards, and prisoner or prisoners, while on the trip, by the nearest route usually traveled between the points from and to which such removal is made, to be taxed against, and paid by such prisoner, on conviction, or, if he is insolvent, or

is acquitted, by the county in which the offense was committed; but in no case shall the county to which such prisoner was removed be liable for such costs or fees."

Very truly,
J. Q. SMITH,
Attorney General.

CONVICTS:—Where convict applies for writ of habeas corpus the court may commit the petitioner to the custody of the sheriff of the county pending disposition of application.

Hon. C. B. Rogers,
State Warden General,
Capitol.

March 3, 1920.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 2nd instant, with reference to habeas corpus proceedings instituted on behalf of Tom Thurman. Papers attached to your letter are returned herewith.

Under the provisions of section 7027 of the Code of 1907, the court or judge before whom such proceedings are had, "may adjourn the examination from time to time as the circumstances of the case may require, and in the meantime remand the party or commit him to the custody of the sheriff of the county," etc.

I think the Court had the authority under the statute referred to, to commit the petitioner Thurman to the custody of the sheriff of the county until the application filed on behalf of Thurman shall have been finally disposed of.

Very truly yours,
J. Q. SMITH,
Attorney General.

CONVICTS:—Governor may suspend sentences and grant conditional pardons.

Hon. Thos. E. Kilby, Governor,
Capitol.

March 3, 1920.

Dear Sir:

In reply to your verbal inquiry relative to your authority as Governor to attach conditions to paroles granted you are respectfully advised as follows:

Section 124 of the Constitution of 1901 vests in the Governor the "power * * * after conviction, to grant reprieves, paroles, commutations of sentence and pardons, except in cases of impeachment."

It is provided in section 7515 of the Criminal Code as follows:

"The governor may, whenever he thinks best, authorize and direct the discharge of any convict from custody and *suspend the sentence* of such convict without granting a pardon, and prescribe the terms upon which a convict so paroled shall have his sentence suspended."

This section of the Code, adopted in pursuance of the provision contained in the Constitution of the State, specifically authorizes the suspension of a sentence or the prescribing of terms upon which a convict is paroled. Thus it will be seen that the same power that fixes the punishment of a criminal also recognizes the constitutional power vested in the chief executive to suspend that sentence upon such terms as he deems best.

A clear statement of the authority of the chief executive to impose conditions in granting paroles, which statement is approved by the Supreme Court of this state, is found in 20 Ruling Case Law, p. 552, section 35, and is as follows:

"It is universally agreed that the executive may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, either precedent or subsequent or both, on the performance of which the validity of the pardon will depend. This rule is subject to the same restrictions which attach to the official acts and conduct of all public officials, namely, that the condition must be reasonable and compatible with the genius of our laws, and must not be illegal, immoral, or impossible of performance."

I have the honor, therefore, to advise you that you have the power, as the chief executive of Alabama, to grant conditional pardons, the condition to be such as you deem best for the welfare of the State, so long as such condition is

not illegal, immoral, or impossible of performance.—Fuller v. State, 122 Ala. 32.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

ALABAMA POLYTECHNIC INSTITUTE; STATE INSTITUTIONS:

—Trustees have exclusive management of financial and other interests of the Institute, which cannot be interfered with by the Legislature.

March 4, 1920.

Hon. Thos. E. Kilby, Governor,
Capitol.

Dear Sir:

Subject: *Duties of the Trustees of the Alabama Polytechnic Institute.*

The "management and control" of the Alabama Polytechnic Institute is vested by the Constitution of our State in a board of trustees.—Const. 1901, sec. 266. While the Legislature cannot interfere with this control of the Institute, it can pass laws to render the exercise of this power more efficient.

Fuller v. State, 122 Ala. 32.

This the Legislature did by creating the Board of Trustees, a body corporate, with such powers as necessary to accomplish the ends of its creation.—Code 1907, sections 1899 to 1911, inclusive; Acts 1919, p. 653, sections 1 to 11, inclusive.

The act enumerated some of the duties of the trustees, which are as follows, to-wit:

- (1) To appoint the corps of instructors;
- (2) To remove instructors or officers;
- (3) To fix the compensation of officers or instructors, increasing or diminishing their compensation as they deem fit;
- (4) To provide for suitable government for the Institute;
- (5) To fix rates of tuition and fees;
- (6) To confer academic degrees and honorary degrees;

(7) To do whatever else they deem best for the Institute;

(8) To establish and maintain a military department;

(9) To cause to be made for each session of the Legislature a full report of their transactions, of the condition of the Institute, embracing an itemized account of all receipts and disbursements on account of the Institute by those charged with the administration of its finances. (See Acts 1919, pp. 653-4, sections 1 to 13, inclusive.)

This statute does not include every duty imposed on the trustees of the Alabama Polytechnic Institute. They are vested with all those duties and responsibilities, which can not be delegated even to the officers and instructors of that Institute, which are incident to the "management and control" of that institution. This carries the duty of conducting and directing the affairs of the Institute, of governing, controlling, treating with cautious judgment, and of exercising a restraining power over. It is useless to mention that this necessitates a thorough knowledge of the activities and needs of the institution by the trustees. To place the Alabama Polytechnic Institute and the University of Alabama under the control and management of those specially fitted to direct their affairs and to keep them from being subject to vacillating policies resulting from being subject to the varying political winds, the people wrote into the fundamental law of the state an intelligent and stabilized method of direction of their policy and affairs. This is mentioned as a measure of the responsibility and trust the office imposes.

It has been held that the power vested in the trustees by the Constitution gives the trustees the exclusive management and control of the Institute, and that solely to their judgment and discretion is committed the supervision of the *financial* and other interests of the Institute; that this control cannot be interfered with even by the Legislature of the State, as the trustees derive their power from the same source as the Legislature—the State Constitution. It follows that when funds become the unconditional property of the Alabama Polytechnic Institute, they cannot be legally spent except by the direction of its trustees.

Some of the funds over which the Board of Trustees exercise this exclusive control are as follows:

(1) The interest on the fund of \$250,500, amounting to \$20,280 (Acts 1919, pp. 653, 796);

(2) Fees derived from students;

(3) The unconditional appropriations, some of which are as follows: (a) \$40,000 in lieu of fertilizer tag tax; (b) the further sum appropriated for maintenance and support (Acts 1919, p. 796); (c) funds arising from sale of oil tags (Code 1907, sec. 1580).

Regents v. Auditor General, 167 Mich. 451;

People v. Regents of University, 4 Mich. 98.

Although the Constitution places in the hands of the trustees the exclusive control over the funds that are the unconditional property of the Institute, the Legislature may, in making appropriations to its support, attach such conditions to the appropriation as it deems expedient. If the trustees accept the appropriation they also accept the attached condition, and are charged with strictly applying such funds to the purposes for which they were appropriated. In such cases the trustees are charged with directing the funds to the specific matters which in their judgment are best conducive to the promotion of the purpose of the act.

Some of the funds of this character which are under the direction of the Board are as follows:

(1) The Federal fund known as the Smith-Lever Fund, and the State appropriation made to match the same (Acts 1919, pp. 64 and 815).

(2) What is known as the local experiment fund, or boll weevil fund, (Acts 1911, p. 5).

11 Corpus Juris, 986.

Weinberg v. Regents, 97 Mich. 254.

Sterling v. Regents, 110 Mich. 382.

The trustees of the Alabama Polytechnic Institute are the legislative body of that institution, and the officers and instructors are its administrative officers. The administrative officers have no power of legislation, and their duties are to carry into effect the policies, direction, and mandates of the trustees. Expenditure of a fund must be specifically authorized by the trustees, otherwise the expendi-

ture would be illegal. I do not conceive that the law contemplates the trustees directing a fund to a general purpose, and leaving the discretion of the expenditure of that fund to the officers and instructors of the Institute. The Legislature makes appropriations to general purposes, leaving with the trustees, on account of their greater knowledge of the affairs of the Institute, the direction of such fund to those specific items necessary in their judgment to accomplish the general purpose for which the Legislature made the appropriation.

How such specific appropriations are to be made is a question of method, and not of law. Research of the reports of some of the larger institutions discloses that the trustees outlined definitely the policy and purpose of each activity under their control; an itemized budget is prepared, detailing minutely each item of expense deemed necessary to carry out the proposed program, and appropriation of a definite amount is made for each separate expense. A small contingent fund is generally provided to care for unforeseen emergencies. The system of accounting is such that each expense allowed is accompanied by such a voucher as unmistakably evidences the fact that it falls definitely within the purpose for which the appropriation was made by the trustees. Thus the trustees are in absolute touch with the work of the Institute, the institution gets the benefit of their knowledge, judgment and discretion, and they thus discharge their constitutional responsibilities in the management and control of the Institute.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

OFFICE HOLDERS; UNITED STATES SENATOR:—No formal notice is required of the death of a United States Senator. No set form is provided for credentials of appointee.

Hon. Thos. E. Kilby, Governor.
Capitol.

March 4, 1920.

Dear Sir:

Subject: *Senatorial Appointment.*

1. *Notice of Vacancy in United States Senate.*

Neither the United States laws nor the statutes of Alabama require the receipt of an official notice of the death

of a United States from Alabama before you, as Governor, are authorized to make an appointment to fill the vacancy created thereby. It merely rests with you to be personally satisfied of the fact.

Senator Bankhead's death is a matter of common knowledge, an historical fact, of which an official might be presumed to know and on which presumption you would be justified in acting.

Whitworth v. Oliver, 39 Ala. 286, 289.

Cook v. State, 110 Ala. 40.

16 Cyc. 868.

2. *Appointee's Credentials.*

No fixed form or method is prescribed for making a temporary appointment to fill a vacancy in the United States Senate. The Senate is its own judge as to the qualification and election of its members.

Constitution of United States, sec. 5.

U. S. Compiled Statutes (1916) Vol. 10, p. 14.

Therefore, any credentials that satisfy the Senate that the party is the appointee of the chief executive of the state to fill the vacancy, are sufficient.

It is only proper, however, that so important an official act should be evidenced in some formal manner. When United States senators were elected by the Legislature, the Governor was required to certify such election, under the seal of the State, to the President of the United States Senate; but this statute was superseded by the 17th Amendment of the U. S. Constitution, providing for the election of United States senators by the people.

Fed Stat. Ann. Vol. 2, p. 211, sec. 18.

U. S. Compiled Statutes (1916), Vol. 1, p. 14.

Section 135 of the Constitution of Alabama of 1901 provides that commissions shall issue "sealed with the Great Seal of the State, signed by the Governor and countersigned by the Secretary of State."

Mayfield's Constitution of Alabama 1901, p. 190.

While neither of these provisions directly determines the method of appointment or form of the credentials, they do

furnish evidence of what is generally considered proper and fitting in such matters. I have drafted credentials analogous to those mentioned, for your Excellency's convenience, should you see fit to use the same.

Respectfully,

J. Q. SMITH,
Attorney General.

ROADS:—Contracts may be sublet by one company to another, with the written consent of the State Highway Engineer. Contracts are to be signed by State Highway Engineer, but should be passed on by the Highway Commission.

Hon. W. S. Keller,
State Highway Engineer,
Bell Building, Montgomery, Ala.

March 8, 1920.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 6th instant, concerning a proposal to transfer a contract for road construction on Alabama Federal Aid Project, No. 56, in Jefferson County, from the Southern Bitulithic Company to the Southern Roads Company.

If no provision with reference to a transfer of the contract had appeared in the original contract, the transfer, with the consent of all parties concerned, could be easily effected. There is, however, a limitation upon the right to assign the contract on page 6 of the original contract to which you call attention in your letter. This provision stipulates that the contract shall not be sublet to another contractor except with the written consent of the State Highway Engineer, and that in no event would the contractor be released from responsibility.

I can see no obstacle to interfere with the transfer, if it be agreeable to all the parties, which appears to be the case.

Of course I know nothing of the financial responsibility of the Southern Roads Company as compared with that of the Southern Bitulithic Company, but I do not understand from your letter that you desire information along this line. As I understand your inquiry, the only information which you desire is as to whether the contract can be legally transferred, and if the papers attached to your letter are sufficient for that purpose.

As stated above, there is no legal obstacle to interfere with the transfer of the contract. I call your attention, however, to the sentence in the clause on page 6 of the original contract to which you call attention in your letter, which provides that in no event will the contractor be released from responsibility. It will be noted that the draft of the proposed transfer which is attached to your letter absolves the Southern Bitulithic Company, the original contractor, from all further liability in connection with the original contract and places full responsibility upon the Southern Roads Company. Of course if it be desired that the Southern Bitulithic Company be released from any and all further liability on account of the original contract, this can be done by agreement and the attached form of agreement for transfer, as it at present reads, has that effect. I call your attention to this in order that, if it be your desire that the Southern Bitulithic Company be also held responsible for the fulfillment of the contract, it may be so revised as to contain a provision to that effect. It may be, however, that it is satisfactory to all parties that the Southern Bitulithic Company shall be released from any and all liability for the performance of the contract, and I assume this is the case, since the United States Fidelity & Guaranty Company has as surety executed a bond for the faithful performance of the contract and has agreed in writing to the proposed transfer of the original contract.

It will be noted that section 13, Acts 1919, p. 896, provides that every contract for road and bridge construction or maintenance under the provisions of the Act, shall be made in the name of the State of Alabama, and signed by the State Highway Engineer. I am therefore of the opinion that the State Highway Engineer has the authority to execute the contract covering the proposed transfer. I am of the opinion, however, that it would be well for the matter to be submitted to and passed upon by the Highway Commission before the contract is executed by the State Highway Engineer, as it is the intent and purpose of the statute that the State Highway Commission should pass upon all such matters.

The papers attached to your letter are herewith returned.

Very truly yours,

LAMAR FIELD,
Assistant Attorney General.

OFFICE HOLDERS; STATE BOARD OF EDUCATION:—Providing compensation for State Superintendent of Education for additional duties as chairman of State Board of Education does not offend section 281 of the Constitution.

March 11, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

You request this office to advise you whether the State Board of Education could validly appropriate \$1,500.00 annually from the revolving fund allowed that Board, to compensate the State Superintendent of Education as the executive officer of said Board.

By an Act approved September 26, 1919, the State Board of Education was created and vested with certain powers relative to the general control and supervision over certain public schools of the State. Acts 1919, p. 570. The Legislature appropriated to this Board \$100,000 annually to be used as a revolving fund with the provision that at least 80 per cent thereof, if used, "should be expended for lengthening school terms or otherwise bettering conditions in rural schools." Acts 1919, p. 29.

The State Superintendent of Education is by the express wording of the statute made a member of the State Board of Education and is chairman and executive officer of the Board. Art. 3, Sec. 1, Acts 1919, p. 569. By provision of Article 3 of this last mentioned Act, the State Board of Education is empowered to use for "expenses and compensation of the members of the State Board of Education in the discharge of their official duties" any part of the revolving fund which is not directed to be expended for lengthening school terms and improving rural schools.

This Act providing for an educational system (Acts 1919, p. 565) and the State Board of Education by virtue of the power bestowed on it, both imposed upon the State Superintendent of Education numerous duties which, prior to the approval of the Act, he was not charged with performing. To compensate for these extra duties the State Board of Education provided that the executive officer of the Board should receive \$1500 annually from the revolving fund. This amount is within the 20 per cent of the revolving fund, the

use of which is left exclusively within the discretion of the State Board of Education. As the Act provides that this part of the revolving fund should be used to compensate the members of the State Board of Education, and as the State Superintendent of Education is a member of the State Board, it follows that the allowance under consideration is valid unless prohibited by the constitutional provision which prevents increasing the salary of an officer during his term of office.

This allowance does not infringe the constitutional inhibition against increase of salaries during an officer's term of office because it merely seeks to compensate the State Superintendent of Education for the additional duties required to be performed by him by the State Board of Education and the Act establishing a complete educational system for the State of Alabama. It has been held by this and many other states that providing compensation for new and additional duties enjoined does not offend the principle of this constitutional provision.

State v. Prince, 74 Sou. (Ala.) 939;

State ex rel Vandiver v. Burke, 175 Ala., 561; 57 Sou 870;

State ex rel Harvey v. Sheehan, City Auditor, 190 S. W. 864, etc.;

Cunningham v. Current River Co., 165 Mo. 270, 65 S. W. 556;

State ex rel. v. Walker, 97 Mo. 162, 10 S. W. 473;

State ex rel. v. Ransom, 73 Mo. 89; State ex rel McGovney, 92 Mo., 428, 3 S. W. 867;

County v. Felts, 104 Cal. 60, 37 Pac. 780;

State ex rel. v. Board of Commissioners, 23 Mont. 250, 58 Pac. 439;

State ex rel. v. Carson, 6 Wash. 250, 33 Pac. 428;

Love, Attorney General, v. Baehr, Treasurer, 47 Cal. 364;

Purnell v. Mann, 105 Ky. 87, 48 S. W. 407, 49 S. W. 346, 50 S. W. 264;

Lewis v. State, 21 Ohio Cir. Ct., R. 410.

Yours very truly,

HARWELL G. DAVIS,
Assistant Attorney General.

OFFICE HOLDERS; DEPARTMENT OF AGRICULTURE:—Supervisor of foods, feeds, and drugs is not a State officer, but a clerical assistant, and may receive additional compensation for additional duties imposed as fixed by law.

March 11, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

This office begs to advise as follows in answer to your inquiry as to whether the Supervisor of the Division of Foods, Feeds and Drugs is entitled to draw a salary as such supervisor, and also additional compensation under the Act regulating the manufacture and sale of insecticides and fungicides:

Section 10 of an Act approved September 30, 1919, (Acts 1919, p. 1009), makes appropriation for the salary of the Supervisor of the Division of Foods, Drugs and Feeds in the following language:

“There shall be employed in the office of the Division of Foods, Drugs and Feeds clerical assistants, as follows: (1) A supervisor, whose salary shall be Two Thousand Dollars (\$2,000.00) for every year.”

From the wording of this provision it will be seen that the Supervisor of this division is classed by the lawmakers as a “clerical assistant.” Section 3 of the Act regulating the manufacture and sale of insecticides and fungicides (Acts 1919, p. 710), provides among other things:

“That the Commissioner of Agriculture and Industries is hereby authorized to enforce all the provisions of this act through the division of foods, feeds and drugs. * * * * *

For the administration, clerical and sampling work required under provisions of this act, the Commissioner of Agriculture and Industries, is hereby authorized to expend from any funds accruing under this act, for compensation of the assistants or samplers performing services under this Act not exceeding twenty-five dollars (\$25.00) each, per month, or a total amount not to exceed fifteen hundred dollars (\$1500.00) per

annum. Such expenditures shall be paid by warrant of the State Auditor upon bills approved by the Commissioner."

This section makes it the duty of the Commissioner of Agriculture to administer this Act through the division of foods, feeds and drugs. The Commissioner of Agriculture and Industries is thereby authorized within the limits prescribed to allow extra compensation to his clerical assistants in consideration of the new duties imposed by this Act. The parties affected by this increase are not officers within the meaning of the constitutional inhibition against an increase of pay during their term of office.

State v. Sanders, 187 Ala. 79; 65 Sou. 378.

It follows that the Supervisor of the Division of Foods, Feeds and Drugs, is entitled to compensation as a clerical assistant under the Act regulating the manufacture and sale of insecticides and fungicides if the Commissioner of Agriculture and Industries authorizes such compensation under section 3 of said Act.

Very truly yours,
HARWELL G. DAVIS,
Assistant Attorney General.

LICENSES; AUTOMOBILES; TAXATION:—County is not permitted to impose a license tax on private automobiles in addition to that imposed by the State.

March 12, 1920.

Mr. M. A. Graham,
Prattville, Ala.

Dear Sir:

Replying to your inquiry relative to the authority of the Court of County Commissioners to impose a license tax on automobiles for public road purposes, I beg to advise as follows:

That the act of 1919 (Acts 1919, p. 398) imposing license taxes on automobiles, like the act of 1915 (Acts 1915, p. 489), provides that the license tax required thereby shall be in lieu of all other privilege tax which a county may impose where the automobile is devoted to the private use of the owner and his family. By the express wording of this statute the county is not permitted to impose a license tax

for any purpose on an automobile devoted to the private use of the owner and his family.

What is known as the Goode Act (Acts 1915, p. 576), authorized county commissioners' courts to impose license taxes for each class of vehicles for road purposes. The commissioners' court therefore has authority to impose a license tax for road purposes on all automobiles not devoted to the private use of the owner and his family, or, in other words, a license tax may be imposed on a car used for commercial purposes.

Mills v. Commissioners of Conecuh County, Supreme Court, in MS.

It follows that the provision of the road law of your county which attempts to impose a license tax on automobiles devoted to the private use of the owner and his family, is invalid.

Very truly yours,
J. Q. SMITH,
Attorney General.

LICENSES; AUTOMOBILES; TAXATION:—Automobile owned and used by County Highway Engineer is not exempt from license tax. If owned by county or municipality must pay for tag.

March 12, 1920.

Mr. S. R. Batson,
County Highway Engineer,
Birmingham, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 8th instant, with reference to license tax covering automobiles operated by your Department.

I am of the opinion that if the cars to which you refer are owned and operated by you personally and for your own account, the cars would be subject to the scale of licenses set out in section 6 of the revenue law. Acts 1919, p. 397.

If the cars to which you refer are owned and operated by Jefferson County, I am of the opinion that the following provision of Acts 1919, p. 399, would apply, and that each car would be subject to a charge of 50 cents as therein provided.

"Nothing herein contained shall be construed so as to impose a license tax on motor vehicles owned and used by any municipal corporation in this State, but all such vehicles shall bear a numbered tag, which the probate judge is authorized to deliver without the payment of any fee or charge, except the sum of fifty cents to cover the cost of each tag delivered by him to such municipal corporation, and the proceeds of such payments shall be made to the State treasurer without any deduction for commissions by the probate judge."

You refer to section 5 of the State Highway Commission bill, Acts 1919, p. 893, which provides that "motor vehicles used by the State Highway Department, its officials and engineers shall not be subject to any State, county or municipal license." I am of the opinion that this provision refers to the members of the State Highway Department and the officials and engineers thereof directly connected with the State Highway Department, and that it was not intended that this provision should include the county engineers.

Yours very truly,
J. Q. SMITH,
Attorney General.

PROHIBITION LAWS:—Whisky stored in this State may not be shipped to another state.

March 12, 1920.

Hon. J. K. Dixon,
Talladega, Ala.

Dear Sir:

The Attorney General's office is in receipt of letter of the 6th instant, making inquiry as to whether whiskey in a bonded warehouse in Birmingham may, under the laws of Alabama, be transported out of the State for the purpose of sending to druggists in other States in which such druggists are permitted to use whiskey for medicinal purposes.

When the prohibition laws of 1915 were enacted it was recognized that there was no legal authority by which liquors could be shipped out of the State after the prohibition law went into effect. In order to enable owners of

stores of liquors in the State to ship them out of the State after the prohibition law became effective, an Act was passed (Acts 1915, p. 631) authorizing the shipment of such liquors out of the State. It will be noted, however, that section 9 of the Act provides that there shall be no authority for the transportation of such liquors under the provision of the Act after twenty days from the approval of the Act, the Act having been approved on September 17, 1915.

Inasmuch as the period provided in the Act for shipping out of the State has expired and there is no other authority provided by statute for such shipments, I am of the opinion that it is a violation of the law to make such shipments from a point within the State to a point outside the State.

The 1919 Act (Acts 1919, p. 16, sec. 16) authorizes shipments through Alabama from one State to another, but contains no authority for making shipments from any Alabama point to another State.

Yours truly,
J. Q. SMITH,
Attorney General.

BOARD OF CONTROL AND ECONOMY; PRINTING AND STATIONERY:—Commissions for Adjutant General's Department are to be furnished under contract calling for "commissions, blank," where similar commissions have been furnished by same contractor under previous contract using same language.

March 12, 1920.

Hon. W. D. Nesbitt,
Chairman Board of Control and Economy,
Capitol.

Dear Sir:

This office is in receipt of your letter enclosing contract between Marshall & Bruce Company and the State of Alabama, by which that company agrees to furnish the State with certain stationery and supplies, at the prices named therein; and also enclosing the correspondence between the Board of Control & Economy and Marshall & Bruce Company, relative to the contention of that company that this contract does not cover commissions for the Adjutant General's department of this state. You request to be advised as to the correctness of this contention.

1.

That part of the contract pertinent to this inquiry is as follows:

"Commissions, Gilt Seals attached,			
Litho 30 lb. Western Demy			
Notary Public	1000	60.00	50.00
N. P. & J. P.	1000	60.00	50.00
Justice of the Peace	1000	60.00	50.00
Constable	1000	60.00	50.00
Blank	1000	60.00	50.00
Commissioner	1000	60.00	50.00"

The answer to your inquiry necessitates determining whether the sub-head "Blank" of the quoted section of the contract includes commissions for the Adjutant General's department. There is no provision in the contract confining this section to commissions used in the office of the Secretary of State, as contended by the company or which states specifically what commissions are covered thereby. As this provision of the contract is ambiguous, in ascertaining the real intention of the parties the courts will permit the introduction of evidence of extrinsic circumstances to aid in its construction.

Alexander v. Sanders, 93 Ala. 345, 9 South. 521.

Cross v. Scruggs, 115 Ala. 258, 22 South. 81.

Where the construction of a contract depends on extrinsic facts, its construction is question of fact for the jury and not a question of law.

Boykin v. Bank of Mobile, 72 Ala. 262.

Weir v. Long, 145 Ala. 328, 39 South. 974.

While this office cannot determine the question of fact raised by your inquiry, it can furnish the rules governing in such circumstances for your guidance in determining whether or not the company should be required to furnish the commissions for the Adjutant General's department under this contract.

This office is advised that the State of Alabama has had a contract with Marshall & Bruce Company similar to the

one under consideration since 1910. We have examined the contract covering the years 1910 to 1912, and find that as to commissions the terms of that contract are identical with the one under consideration. The Adjutant General's office has furnished us with commissions which they state were furnished by Marshall & Bruce Company to their department under the contract of 1910-12. If we are correctly advised as to these facts, the act of the company in furnishing commissions for the Adjutant General's office under the previous contract, the provisions of which are identical with the one under consideration, estops the company from denying that such commissions are included in the present contract. The adoption of the wording of the former contract in the present contract was also an adoption of the construction and meaning it had been given in the former contract. It is a settled rule of law in this state that where parties to a contract by their acts have given to its terms a particular construction, that construction will be binding.

Mobile County v. Lynch, 198 Ala. 57, 73 South. 423.
Jefferson Plumbers & Mill Supply Co. v. Peebles, 195
Ala. 608, 71 South. 413.
Birmingham W. W. Co. v. Hernandez, 196 Ala. 438,
71 South. 443.

2.

The expense of preparing these blanks is a proper charge against the appropriation made for the purpose of carrying out the provisions of the act relative to the National Guard of the State, which was approved September 19, 1919 (Acts 1919, p. 467).

We return herewith the contracts and correspondence submitted with your inquiry.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

PROHIBITION LAWS:—Druggists are not allowed to have in their possession wines for pharmaceutical purposes.

March 13, 1920.

Hon. J. K. Dixon,
Talladega, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 6th instant, requesting an opinion as to whether druggists in the State of Alabama can have in their possession or use wines for the making of pharmaceutical preparations.

Section 2 of Acts of 1919, page 7, makes it unlawful for anyone to have in possession any prohibited liquors and beverages in any quantity whatsoever with the exception of the following:

(1) Wine or cordial made from grapes or other fruit when the grapes or other fruits are grown by the person making the same for his own domestic use upon his own premises in this State, and when such person keeps such wine or cordial for his own domestic use on his own premises in any quantity not exceeding five gallons for one family in twelve months.

(2) Pure or grain alcohol in non-prohibited quantities by persons who are permitted to buy, sell, use or possess the same under existing laws of the State.

(3) Wine for sacramental purposes when received and possessed by an authorized person in accordance with the rules and regulations prescribed by law and when not exceeding the quantity so prescribed.

Inasmuch as it is made unlawful for anyone to have in possession prohibited liquors except in the three instances above provided for, none of which includes wines for the making of pharmaceutical preparations, I am of the opinion that it is unlawful for druggists to have in their possession or use wines for the purpose of making pharmaceutical preparations.

Very truly yours,
J. Q. SMITH,
Attorney General.

CHILD WELFARE; SCHOOL SYSTEM; COMPULSORY EDUCATION:—No child under fourteen can be employed in agricultural work during time when schools are in session.

March 15, 1920.

Mrs. L. B. Bush,
Child Welfare Department,
Capitol.

Dear Mrs. Bush:

In reply to your inquiry of March 11, I beg to advise you as follows:

The Child Labor Law of 1915 (Acts 1915, p. 193) was entirely rewritten by the Legislature of 1919 (Acts 1919, p. 867).

Section 8 of the original act provided as follows:

"No child under 16 years of age shall be employed or be permitted to work, or be detained in and about any mill, factory or manufacturing establishment in this State, unless such child shall attend school for eight weeks in every year of employment, six weeks of which shall be consecutive."

The Legislature of 1919 amended this section so as to read:

"No child under 14 years of age shall be employed, permitted, or suffered to work in any employment or service during the hours when the public schools of the district in which the child resides is in session."

Thus specifically extending this section so as to include every employment or service of any kind.

We are of opinion, therefore, that no child under fourteen years of age can be employed on the farm, or otherwise, during the time when the public schools of the district in which the child resides are in session.

We are confirmed in this conclusion by the further fact that the Legislature of 1919 (Acts 1919, p. 615) extended the compulsory school attendance law so as to allow only one exemption to children under fourteen years of age—that to a child between the age of eight and sixteen, who lives more than two and a half miles from the school, and even then, only in the event the child is not provided "public transportation within reasonable walking distance."

There is a further specific exemption of children "who are physically or mentally incapacitated for the work of the school," but this applies only to the physical or mental status of the child, and does not even remotely relate to the service or employment in which the child may be engaged.

Yours very truly,

J. Q. SMITH,
Attorney General.

LAW ENFORCEMENT OFFICER; SHERIFFS:—A sheriff may deputize as many persons as he deems necessary.

March 19, 1920.

Hon. Thomas E. Kilby,
Governor,
Capitol.

Dear Sir:

Hon. C. W. Austin, State Law Enforcement Officer, called at the office today and made mention of the fact that a number of dipping vats had been destroyed by parties in Chilton county, requesting that this office advise as to the rights of a sheriff to require private persons to assist him in arresting parties guilty of this offense.

An Act of the Legislature of the 1919 session (Acts 1919, p. 792) provides that the sheriff must have one chief deputy and may have as many other deputies as he may think proper. I am of the opinion that the sheriff would have the authority under this Act to specially deputize as many persons as he might think necessary to assist him in locating and arresting the guilty parties.

Section 6271 of the Code also provides that "it is the duty of every person when required to do so by an officer to assist him in making an arrest."

I also quote section 7710 of the Code which refers to the refusal of a person to aid an officer in making an arrest or executing process as follows:

"Any person who, having been summoned or commanded by an officer, constable, or other officer having authority, to assist such officer in making an arrest or in executing any other duty devolving upon him under

any law in relation to public offenses, refuses or neglects to obey such summons or command, must, on conviction, be fined not less than fifty nor more than three hundred dollars."

In view of the statutory provisions herein above referred to, I am of the opinion that the sheriff of Chilton county is clothed with ample authority to name as many persons as he may desire to specially deputize for the purpose of locating and arresting all persons connected with the offense above referred to.

Very truly yours,

J. Q. SMITH,
Attorney General.

PROHIBITION LAWS:—Druggists and physicians may use certain amounts of grain alcohol for compounding remedies.

March 22, 1920.

Hon. J. K. Dixon,
Talladega, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 18th instant, in which you make inquiry concerning the rights of persons to have in their possession grain alcohol. You state the question has arisen several times as to whether or not under any circumstances a doctor or any person other than a wholesale druggist or retail druggist with a regular licensed pharmacist, is permitted to have in his possession, at one time, in the State of Alabama, more than one gallon of grain alcohol. You also state that the question has arisen in connection with small drug businesses run by physicians for their private practice and for small sales outside of their practice, and in connection with physicians who themselves manufacture patent medicines in addition to their regular practice, and ask whether in my opinion physicians can under any of the above circumstances have in their possession more than one gallon of alcohol at any one time.

The regulations concerning the sale and having in possession, of alcohol appear to be contained in section 9, Acts 1915, p. 556, section 7, Acts 1915, p. 4, and section 10, Acts 1915, p. 5.

Section 9 above referred to provides that wholesale druggists may sell alcohol in quantities not greater than five gallons at any one time, to be used in the arts, or for scientific or mechanical purposes, etc.

Section 7 above referred to provides that any retail druggist in this State who is himself a registered or licensed pharmacist may sell in the manner therein set out, pure alcohol for medicinal purposes only, and grain alcohol to chemists and bacteriologists actually engaged in scientific work, and for such purposes only, and that such druggists may use alcohol in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of the special tax required of liquor dealers by the United States, and that regularly licensed and practicing physicians may purchase grain alcohol or pure alcohol in quantities of not more than one gallon at a time from wholesale or retail druggists and may use the same in compounding and dispensing remedies in the practice of their profession only.

Section 10 above mentioned provides that retail druggists may sell in quantities not greater than five gallons alcohol to be used in the arts or for scientific or mechanical purposes, and such druggists may sell in like quantities grain alcohol to chemists and bacteriologists engaged in scientific work, and for such purposes only.

You will find your inquiry fully answered by the statutes above quoted.

If I can serve you further in this connection please advise.

Yours very truly.

J. Q. SMITH,
Attorney General.

ELECTIONS:—Ballots are numbered and initialed after being marked, which number has no connection with the number of the elector on the official list.

March 24, 1920.

Mr. Frank O. Deese,
Ozark, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 23d ultimo, in which you make inquiry as to whe-

ther numbers shall be placed upon ballots before they are deposited in the ballot box.

Section 20, Acts 1919, p. 971, provides that as the inspectors deposit the ballot the name of the voter shall be checked off of the *official voting list*, but no numbers or other identification of any kind shall be placed upon the ballot of the voter except that one of the inspectors as he hands out the ballot to the voter shall initial the same on its back, and before depositing it in the ballot box shall examine the said ballot and see that it contains the initials aforesaid. This clause merely means that no numbers shall be placed upon the ballot so as to identify the ballot with any number on the official voting list on which the names of the voters are checked off as their ballots are deposited in the ballot box.

Further on in section 20 it is provided that all ballots shall be numbered on the back thereof before being deposited in the ballot box and a corresponding number be placed by the inspectors *on a record to be kept for that purpose by them*, which record shall be enclosed in a separate envelope and sealed and directed to the probate judge and filed with him by the returning officer and be kept by the probate judge *to be opened only in the event of a contest*.

This provision, it will be noted, does not refer to the official voting list, but refers to a separate record on which the names of the voters are written as their ballots are deposited. A number is placed on the ballot and the same number is placed upon the record opposite the name of the voter who casts that ballot, and this record is forwarded to the probate judge sealed, it being provided that it shall not be opened except in the event of a contest. The evident purpose of this provision is to enable the parties hearing a contest to connect each ballot in the ballot box with the name of the party who casts such ballot.

The two provisions referred to appear at first blush to be inconsistent in that, one provision requires that no numbers shall be used on the ballots and the other provision requires such numbers to be placed upon the ballot. The point to be observed, however, is that the number on the ballot has no connection with the names on the official voting list, but only with a record which is sealed and forwarded to the probate judge, not to be opened except in case of a con-

test. Which record after the lapse of a certain time is required to be destroyed.

Very truly yours,
J. Q. SMITH,
Attorney General.

STATE BONDS:—Payment of bonds issued under Act approved December 9, 1862, is now barred by statute of limitations, and is also prohibited by the Constitution of the United States.

March 26, 1920.

Hon. Thos. E. Kilby,
Governor,
Capitol.

Dear Sir:

Replying to your inquiry relative to the obligation of the State to pay the bonds issued by virtue of the provisions of an Act approved December 9, 1862, I beg to advise as follows:

The State is under no legal obligation to pay these bonds as they are barred by the statute of limitations. Code 1907, Secs. 4832-4834. This statute of repose was created to prevent wrong from being done in just such cases as the one under consideration; its purpose is to compel the adjudication of matters at a time all the facts relating thereto are available.

The bond under consideration was authorized by a legislature which gave its allegiance to the Confederate States. While the acts of the Southern States during the Civil War were valid except where such acts aided in the war against the United States or contravened the Constitution of the United States, yet the obligations created to aid in prosecution of the war are absolutely void. The purpose for which this bond was issued is a question which should have been determined when the facts were available.

After the Civil War, the 14th Amendment to the Constitution of the United States was adopted, which in part provided as follows, to-wit:

“But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States.

* * * * But all such debts, obligations and claims shall be held illegal and void."

14 Stat. at Large 358.

If this bond falls within this class of obligations, the Legislature would have no power to authorize its payment. Several reasons convince me that this is such an obligation. By reason of the extravagant and ill-advised lending of the State's credit, just after the civil war, Alabama became so involved financially that during Governor Houston's administration a Commission was authorized "to liquidate and adjust subsisting legal liabilities of the State of Alabama, on bonds issued," etc.

Acts 1874-75, page 102.

If this issue of bonds had been a "subsisting legal liability," they would doubtless have been included in this "Debt settlement," but a careful examination of Governor Houston's report of bonds settled and the ratification of this settlement by a subsequent Legislature failed to mention or consider this issue of bonds, although bonds of the State issued prior and subsequent to this issue were adjusted by the Commission as originally constituted and its successor.

The act authorizing this bond issue cannot be read without the conviction that these bonds were intended to aid in the prosecution of the war against the United States. It authorizes the issuance of the bonds by the Governor for the purpose of "meeting that appropriations which have been or may be made by the general assembly." Sec. 3 of Act, Acts 1862, p. 30. The Acts of the general assembly disclose that an overwhelming part of the appropriation made thereby, was in aid of the prosecution of the war. The same act (Sec. 6) provides for an issue in lieu of these bonds of treasury notes redeemable in Confederate Treasury notes. This being the intent and purpose of the Act the bonds issued thereunder are not only void, but the State Legislature would violate the Constitution of the United States to provide for their payment.

Speed v. Coke, 57 Ala. 223;

Keith v. Clark, 97 U. S. 454, 24 L. Ed. 1071.

Furthermore, this issue has been pronounced void by official declaration, and pretermittting a consideration of the legal effect of such declaration, it at least is an expression at a time when the validity of the issue was determinable by ascertaining the real purpose of the issue.

President Johnson by proclamation on June 21, 1864, placed Lewis E. Parsons in charge of the provisional government of Alabama. Governor Parson by proclamation on July 20, 1865, declared those laws in effect which existed January 11, 1861, with the exception of those relating to slavery, thus suspending all laws enacted by the war legislatures.

Code 1867, pages 72-77;
Jeffries v. State, 39 Ala. 655.

The Constitutional convention of 1865 passed an ordinance approved Sept. 21, 1865, reviving all laws passed by the war legislatures except laws authorizing bonds.

Ordinance No. 5, page 53, Code 1867.

An ordinance was also adopted which was required as precedent to re-establishing the State's relation to the Union, declaring void all debts created by the State in aid, directly or indirectly, of the Confederate War. Ordinance No. 25, p. 58 Code 1867.

As each administration of this State has urged upon it the moral obligation of these bonds, I thought advisable that the question presented not be dismissed with a statement that the State had a legal defense to the payment thereof, but that the moral obligation it carried, and the authority to meet it if such moral obligation existed, should be considered.

It is my opinion that this issue of bonds constitutes no valid claim against the State, and that furthermore, the Constitution of the United States prohibits the payment thereof.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

COUNTY COURTS; SOLICITOR'S FEES:—Clerk is entitled to collect 5% commission on all fines and forfeitures and solicitor's fees paid over by him to the State treasury.

March 27, 1920.

Hon. P. O. Luck, Solicitor,
Columbiana, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 26th instant.

I am of the opinion that the Clerk of the Circuit Court as an ex officio clerk of the county court is entitled to collect 5 per cent commission on all solicitor's fees paid over by him to the State Treasurer under the provisions of section 7798 of the Code, and that he is also entitled to 5 per cent commission on all fines and forfeitures paid over by him to the State Treasurer under section 3272, subsection 16, of the Code in all cases arising in the county courts in which such fines, forfeitures and fees have been collected since August 22, 1919, the date of the approval of the Act making clerks of the circuit court ex officio clerks of the county courts. Acts 1919, page 200.

Section 7798 of the Code allows to the clerk of the circuit court 5 per cent "commission" on all solicitor's fees collected and paid over by him. Section 3272, subsection 16 of the Code, allows the clerk of the circuit court 5 per cent of all fines and forfeitures collected by him for his "compensation." Section 3 of the 1919 Act referred to provides that "fees and compensation" of clerks of the circuit court acting as ex officio clerks of the county court shall be the same as now allowed by law to the clerks of the circuit court "in criminal cases" and shall be paid in like manner.

I think it clear that the 5 per cent of all solicitor's fees and fines and forfeitures is compensation for services rendered in criminal cases and that the clerk of the circuit court as ex officio clerk of the county court, is clearly entitled to collect the 5 per cent of all such solicitor's fees, fines and forfeitures.

Yours very truly,

J. Q. SMITH,
Attorney General.

UNITED STATES TREASURY CERTIFICATES; COUNTIES AND MUNICIPALITIES:—Municipal funds cannot be used for investment in United States Treasury Certificates.

March 30, 1920.

Mr. Silas W. Davis, Government Director,
Rhodes Building,
Atlanta, Georgia.

Dear Sir:

Your letter requesting to be advised whether the counties and municipalities in this state are authorized to invest in the new Treasury Certificate has been referred to me for reply.

The policy long adopted in this State is that a county or other municipal corporation can incur no liability, make no contract, nor do any act, regardless of the benefits that might be derived thereby, unless the power to do so is derived either from an express authorization of the law, or by necessary implication. They have no implied commercial powers except those which are necessary to the performance of the governmental functions imposed on them.

Mobile v. Drago, 172 Ala. 155, 54 South. 995;
Naftel v. Montgomery County, 127 Ala. 563, 29
South. 29.

Jack v. Moore, 66 Ala. 184.

Speed v. Cocke, 57 Ala. 209.

Simpson v. Lauderdale Co., 56 Ala. 64.

Commissioners Court v. Moore, 53 Ala. 25.

Barbour County v. Clarke, 50 Ala. 418.

Posey v. Mobile, 50 Ala. 6.

Mitchell v. Tallapoosa Co., 30 Ala. 130.

Such investments being neither expressly authorized by statute nor necessary to the performance of any of the governmental functions with which the counties or other municipal organizations are charged, there would be no right to use any funds thereof for such purposes.

Yours very truly,

J. Q. SMITH,
Attorney General.

COUNTY COURTS; TRIAL TAX:—Trial tax does not apply to cases in county court.

March 31, 1920.

Hon. Arthur L. Hardegree,
Deputy Solicitor,
Ashland, Alabama.

Dear Sir:

I beg to acknowledge receipt of your letter of March 29, with reference to clerks collecting a three-dollar fee as required by statute in misdemeanor cases in the County Court.

I beg to advise that section 41½ of the Revenue Act of 1919 (page 284) provides that a trial tax of three dollars "be and the same hereby is imposed in each case, civil, criminal, and equity, which hereafter goes upon the docket of any *circuit* court in this state, to be taxed and collected as other costs, and when collected to be paid by the clerk of such court into the general funds of the state treasury."

You will observe from a careful reading of this act that it only applies to cases in the circuit court, or which may go to the circuit court on appeal. I do not think it applies to misdemeanor cases in the county court.

Hoping that this information is what you desire, I am,

Very truly,
J. Q. SMITH,
Attorney General.

LAW ENFORCEMENT OFFICERS; SEARCH WARRANTS:—Officers of Law Enforcement Department have no authority to execute search warrants.

March 31, 1920.

Hon. Thomas E. Kilby,
Governor,
Capitol.

Dear Sir:

In response to your oral request for an opinion as to whether the officers of the Law Enforcement Department have authority to execute search warrants by which it is sought to locate intoxicating liquors, I invite your attention to the following statutes:

Section 7757 of the Code defines a search warrant as an order in writing in the name of the State, signed by a magistrate, "directed to the sheriff or to any constable of the county," commanding him to search for personal property and bring it before the magistrate.

Section 7761 of the Code provides that if the magistrate is satisfied of the existence of the grounds of the application for a search warrant, or that there is probable ground to believe their existence, he must issue a search warrant, signed by him, "directed to the sheriff or to any constable of the county," commanding him forthwith to search the person or place named for the property specified, and to bring it before the magistrate.

Section 7762 of the Code provides the form of a search warrant, the caption thereof being directed as follows: "To the Sheriff or any Constable of the County."

Section 7763 of the Code provides that the warrant may be executed by any one of the officers to whom it is directed, that is to say, the sheriff or any constable, but by no other person except in aid of such officer at his request, he being present and acting in its execution.

Section 22, Acts 1915, page 18, which provides for the issuance of search warrants for the purpose of locating intoxicating liquors, duplicates the language of section 7763 of the Code above referred to, and adds, "but the complainant may accompany the officer who executes the warrant and give information and assist him in executing the writ."

The substance of section 7761 of the Code as above quoted is repeated in section 22 of the 1915 act above referred to, it being provided therein that the magistrate must issue a search warrant, signed by him, "directed to the sheriff or to any constable of the county," etc. The 1915 act also provides that the magistrate may direct the warrant to the chief of police or any police officer of a city, when the place to be searched is within a city or within the police jurisdiction thereof.

It will be noted from what is said above that the authority for executing search warrants is confined to sheriffs and constables, and police officers of cities, in cases in which the place to be searched is within a city or within the police jurisdiction thereof.

The act creating the Law Enforcement Department contains a provision to the effect that the members thereof may make arrests in all cases and under such conditions as arrests are made by the sheriffs and other officials under the laws of the state, but contains no provision authorizing such officers to execute search warrants, and I am of the opinion that such officers are therefore without authority to execute search warrants.

The probable reason for confining the execution of search warrants to sheriffs and constables is that the sheriffs are required by the provisions of section 5866 of the Code to execute a bond in the sum of not less than five thousand dollars, and constables are required by the provisions of section 3327 of the Code to execute a bond in the sum of one thousand dollars, before entering upon the performance of the duties of their offices. In case any person should be aggrieved or injured by illegal action on the part of such sheriffs or constables, such person could file suit upon the bond of such officer and recover such damages as he might be entitled to receive.

As above stated, I am of the opinion that the officers of the Law Enforcement Department have no authority to execute search warrants for the reasons hereinabove stated.

Very truly,
J. Q. SMITH,
Attorney General.

TAX EXEMPTION; ELEMOSYNARY INSTITUTIONS:—Property of Alabama Bible Society at Montgomery is exempt from taxation under Act of 1854, which is not affected by later constitutions.

April 3, 1920.

Mr. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Answering your communication relative to the exemption of the Alabama Bible Society from taxation, I beg to advise that this company was incorporated by the Legislature by an act approved February 17, 1854 (Acts 1853-54, p. 317). Section 7 of this act provided, "that the property

of the said Alabama Bible Society at Montgomery shall be exempt from taxation."

In the case of *State of Alabama v. Alabama Bible Society*, 134 Ala. 632, it was held that the Constitution of 1819, which was in force at the time this statute was passed, did not prevent the Legislature from exempting private corporations from taxation, and that this exemption was not affected by the provisions of subsequent constitutions of the state which provided that such exemptions could not be granted.

Yours very truly,

J. Q. SMITH,
Attorney General.

STATE HEALTH DEPARTMENT:—Violations of rules and regulations of State Board of Health should be prosecuted by solicitor or deputy solicitor, or presented to a justice of the peace or judge of the county court.

April 5, 1920.

Dr. S. W. Welch,
State Health Officer,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 2nd instant, making inquiry as to the enforcement of regulations adopted by the State Board of Health.

Section 5, subsection 6 of the 1919 (Acts 1919, p. 911), reads as follows:

"To adopt and promulgate rules and regulations providing proper methods and details for administering the health and sanitary laws of the State, which rules and regulations shall have the force and effect of law and shall be executed and enforced by the same courts, bodies, officials, agents and employees as in the case of health laws; and any person knowingly violating or failing or refusing to obey or comply with, any such rule or regulation shall be guilty of a misdemeanor and shall be punished in accordance with the provisions of section 7073 of this Code; and if the violation or failure is a continuing one each day's violation or failure

shall constitute a separate offense and be punished accordingly."

Section 7073 of the Code referred to in subsection 6 above reads as follows:

"Any person violating any of the provisions of article 1 of chapter 22 of this Code, relating to the health laws, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five nor more than one hundred dollars, unless otherwise expressly provided for."

In the event any of the regulations promulgated by the State Board of Health should be violated by any person, the matter should be brought to the attention of the solicitor or deputy solicitor in the county where the offense may have occurred. In order that your Department may be assisted by them in prosecuting the offender.

If the solicitor or deputy solicitor cannot be located and there be a necessity for quick action, the matter could be presented to a justice of the peace or the inferior court, if there be one in the county, or to the probate judge, who is the ex officio judge of the county court, if there be a county court in that county where the offense occurred.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

NURSES:—Act of 1911 refers to students in educational institutions and Act of 1915 refers to students in hospitals. In 1911 Act certain duties are assigned State Health Officer in regard to registration of nurses.

April 5, 1920.

Dr. S. W. Welch,
State Health Officer,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 2nd instant, on the subject of registration of nurses. You refer to an act passed in 1915 (Acts 1915, page 271),

to provide for the State registration of nurses. There is no mention made in this act of the State Board of Health, and I am satisfied you have in mind an act passed by the Legislature in 1911 (Acts 1911, p. 403), approved April 13, 1911, "To authorize certain incorporated educational institutions or societies engaged in teaching and instructing in what is commonly known as professional or trained nursing," etc. While this act does not place upon the State Board of Health any duties, it does place certain duties upon the State Health Officer.

It will be noted, however, that the 1911 act relates to educational institutions, while the scope of the 1919 act to which you refer is confined to persons having served two years in a reputable hospital. Inasmuch as the 1911 act relates to educational institutions, and the 1919 act relates only to hospitals, there appears to be a clear field of operation for each act and no conflict between them. I am therefore of the opinion that the 1911 act is still in full force and effect.

Very truly yours,

J. Q. SMITH,
Attorney General.

STATE HEALTH DEPARTMENT; APPROPRIATIONS; QUARANTINE:—Expense of isolation and treatment of infectious disease may be paid from certain appropriations for State Health Department.

April 5, 1920.

Dr. S. W. Welch,
State Health Officer,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 1st instant making inquiry as to whether there is any fund which the State authorities could draw on to provide for the isolation and maintenance of the patient referred to while he is under quarantine.

I do not find any authority for such expenditure except in section 20 of the Health Code, which is the provision carrying appropriations for your department. Subsections 10 and 16 of this section contain the following language:

"To provide an equipment for a field hospital to be used for isolating and treating cases of infectious and pestilential diseases that may occur in, or be imported into, the State;"

"To employ such clerks, agents and other employees, and to purchase property, materials, and supplies, and to enter into such contracts as may be considered expedient by said Board in discharging its duties, or assisting in the discharge of the duties of other boards or officials having duties in connection with any of the health laws of the State."

It seems to me that the language of those provisions is sufficiently broad to cover the expense by the appropriation made by the Legislature for the Health Department. I do not know whether your Department has sufficient funds to take care of the expense, but I am unable to find any other provision which, in my judgment, covers the point.

Section 727 of the Code contains the following language :

"All expenditures, except such as are provided for by specific appropriations, shall be under the control of the Governor, the judge of probate and commissioners, or board of revenue, or of the municipal authorities according as such expenditures are made under state, county, or municipal authority."

This provision does not carry any appropriation, however, and merely provides under whose direction the expenditures shall be made.

If after reading what is said above, this office can be of any further assistance in connection with the matter, please advise.

Very truly yours,

LAMAR FIELD,
Assistant Attorney General.

CHILD WELFARE; SCHOOL SYSTEM; AFFIDAVITS:—County Superintendent of Schools is not authorized to administer oaths except in connection with public schools. Affidavits as to age must be made before some officer having general power to administer oaths.

April 5, 1920.

Mrs. L. B. Bush,
Director Child Welfare Department,
Capitol.

My dear Mrs. Bush:

Replying to your inquiry of March 26th, I beg to advise that Section 45 of the Constitution of 1901 requires that the subject of an act be clearly expressed in its title. If a provision of the act is not expressed in the title it is unconstitutional.—Bell v. State, 115 Ala. 87.

The title to the act establishing an educational system for Alabama relates exclusively to educational matters, and could, therefore, contain no valid provision not confined solely to education. It follows that the powers vested in the County Superintendent of Education by section 3 of Article 6 of this act (Acts 1919, page 589) to administer oaths is limited to matters pertaining to public schools, and no general authority to administer oaths is conferred thereby.

The certificate of age required by section 10 of the Child Labor Law (Acts 1915, page 197) is not such an affidavit as county superintendents of education are authorized to take, and such affidavits should be made before some officer having the general power to administer oaths and take acknowledgments.

Yours very truly,

HARWELL G. DAVIS,
Assistant Attorney General.

LICENSES; MISDEMEANORS:—Acquittal by probate judge of person charged with doing business without license is conclusive. Person may not be prosecuted for doing business without license after lapse of one year. Both civil and criminal proceedings being authorized for proceeding against delinquents and the courts of the State not having decided whether failure of one bars the other, the safer practice is to employ first the civil proceeding.

April 5, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Your communications relative to the criminal and civil actions for the collection of the license taxes have been received, and I am replying to your several communications in this letter.

1.

Doing business without a license, when a license is required by the statute, is a misdemeanor. (Acts 1919, page 443, section 367). The probate judges, as judges of the county courts, have original and concurrent jurisdiction with the circuit courts of all misdemeanors. (Code of 1907, sections 6696 and 6700). Therefore an acquittal of a person for a misdemeanor by the probate judge is conclusive, and prevents any further criminal process therefor by indictment.—State v. Blevins, 134 Ala. 213.

From such an acquittal the State has no right of appeal. (Code of 1907, section 6234.)

2.

Prosecutions for misdemeanors must be begun within twelve months from the commission thereof. (Code of 1907, section 7347). Each act committed without a license with the intent of engaging in business for which a license is required by statute is a violation of the law.—Dentler v. State, 112 Ala. 70. As each act constituted a violation for which a prosecution could be begun, the statute of limitations as to such act begins to run at the time of its commission. A person could not be prosecuted for a violation of this statute after twelve months from the commission of the act, even though he was still doing business without a license. He would have to be prosecuted for acts commit-

ted within twelve months prior to the prosecution.—*Able v. State*, 90 Ala. 633.

3.

The present revenue act provides for a criminal prosecution of persons doing business without a license, where a license is required for such business by law, and also provides that the State has a lien for such license which is enforceable by a writ of attachment (*Acts 1919*, page 443, section 368). As the statute, however, does not make either the proceeding by attachment or the criminal proceeding the exclusive method of collecting the license, the State would be entitled to recover the amount due in an action of debt.—*State v. Fleming*, 112 Ala. 179; *Greil Bros. v. City of Montgomery*, 182 Ala. 291.

Whether or not an acquittal of a person of the criminal charge of doing business without a license will bar the State from recovering the amount due for the license in a civil action has not been decided in this State, but if the action by the State to recover the amount due for the license is strictly a civil suit the great weight of authority is to the effect that the State is not concluded by an acquittal for the criminal charge because of the difference in the degree of proof required in criminal and civil cases.—*Brittain v. State*, 77 Ala. 202; *State v. Roach*, 112 Pac. 150, 31 L. R. A. (N. S.) 670.

It would be the safer practice, until this question is adjudicated by our highest court, and in cases of bona fide contention as to the liability for such license, the more just practice, to resort in the first place to the civil proceeding.

4.

In actions for the collection of taxes due the State, it is the duty of the solicitor to represent the State. (*Code of 1907*, section 7781.) The Attorney General also has the power to institute proceedings in such case and the authority to direct the solicitor to prosecute in those matters in which the State is interested. (*Code of 1907*, section 636; *Acts 1915*, page 719).

The Governor has the power to direct such suits to be brought (*Code section 2440*), and the Governor and the Attorney General are empowered to employ special counsel if

in their judgment the best interests of the State so require
(Acts 1915, page 719).

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

COUNTY EXPENSE:—Telephone messages are proper expense of counties, but counties are not supposed to supply officials with telephones except as expressly authorized, as under Act of 1919, page 723.

Hon. P. E. Jarmon,
Examiner of Accounts,
Oneonta, Ala.

April 8, 1920.

Dear Sir:

Replying to your inquiry relative to the legality of charges for telephones in the offices of county officials against the county, I beg to advise that the Attorney General, on June 25, 1916, ruled that there was no authority for charging such an expense to a county. This does not prevent, however, some telephone messages necessitated by the emergency of conditions from being a proper charge. Opinion of Attorney General 1914-16, page 383.

That the Legislature itself considered this ruling correct is evidenced by the fact that the last legislature passed an act permitting counties of over 45,000 population to defray the expenses for such telephones. Acts 1919, p. 723. This act applies only to the following counties, Jefferson, Madison, Mobile, Montgomery and Tuscaloosa.

Yours very truly,
J. Q. SMITH,
Attorney General.

STATE TAX COMMISSION; INSPECTION OF BOOKS AND RECORDS:—Commission has authority to inspect books necessary to ascertain assessable valuation of stock of merchandise. This may be done by subpoenaing witnesses to bring books before Tax Commission, and failure to do so may be punished as contempt, in circuit court.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

April 9, 1920.

Dear Sir:

Replying to your inquiry of April 2, 1920, relative to the authority of the State Tax Commission to inspect the books

and records of persons, firms or corporations that have stocks of goods, wares or merchandise to assess, I beg to advise as follows:

The State Tax Commission has the authority to inspect such books and records kept in connection with the business as are necessary to properly ascertain the assessable valuation of the stock of merchandise, and any person, firm or corporation refusing to permit such an inspection is guilty of a misdemeanor. (Acts 1919, p. 449, sec. 417).

This authority is limited to the right of examining these books and records relevant to the value of the thing which is subject to assessment, and if the person, firm or corporation is not "engaged in a business which is subject to a tax on gross receipts, or on capital employed in the state, or on franchise, or on intangible property, or on incomes or excess profits," the Commission has no power to inquire into, or require information as to the liabilities, earnings, profits and loss, and expenses of conduct of the business." (Acts 1919, p. 320, sec. 138, sub-divisions f and g.)

To compel compliance with the provision of the statute, the State Tax Commission may have the person refusing to permit the inspection tried criminally for such refusal. This course is not advisable, however, where there is a bona fide question as to the authority to examine certain records or books. It is also provided that the State Tax Commission may subpoena witnesses to bring before them for examination such books and records as they have a right to examine and upon refusal to comply with such subpoena, application can be made to the circuit judge, who will compel a compliance by attachment and punish for contempt for failure to produce the records or papers. (Acts 1919, p. 320, sec. 138, subdivision g; sections 148, 149).

This latter proceeding should be effective, and in the event it appeared that the refusal of the party to permit inspection was prompted by the criminal intent of defrauding the State by concealment of the proper value, the criminal prosecution would still lie unless barred by the statute of limitations.

Yours very truly,

J. Q. SMITH,
Attorney General.

STATE FIRE MARSHAL; SHERIFFS:—Sheriffs cannot be excused from performing duties required of them under the Fire Marshal Act.

April 14, 1920.

Hon. W. J. Williams,
State Fire Marshal,
Capitol.

Dear Sir:

Replying to your inquiry of today relative to the duties of the sheriff as deputy fire marshal, I beg to advise that section 4 of the act approved September 30, 1919, creating the office of State Fire Marshal and providing for deputies and assistants thereto, and defining their powers (Acts 1919, p. 1013), provides that the sheriffs of the several counties shall be by virtue of such office, assistants to the State Fire Marshal, and subject to the duties and obligations imposed by the act.

Section 5 of the same act makes it the duty of such assistant to report every fire to the State Fire Marshal in writing within ten days after the occurrence of the same.

It is the sheriff's duty to comply with the provisions of this law. In the event he fails to do so, he is guilty of a misdemeanor, and upon conviction may be punished by fine of not less than \$25.00, nor more than \$100 (section 14).

The authority given the State Fire Marshal by section 4 of the act to appoint an assistant to perform the duties of any officer declining to serve does not make it optional with the sheriff whether or not he may serve as a deputy fire marshal, nor does it relieve him from the penalties imposed by section 14. This provision is for the purpose of giving the State Fire Marshal power to make immediate investigation of fires where officers refused to perform their duty, and is not for the purpose of permitting an officer to escape the penalty for failure to discharge the duty imposed by law.

Yours very truly,

HARWELL G. DAVIS,
Assistant Attorney General.

BOARD OF CONTROL AND ECONOMY; PRINTING; STATE GEOLOGIST:—Printing of bulletins for State Geologist should be done through Board of Control and Economy.

Hon. Thomas E. Kilby,
Governor,
Capitol.

April 15, 1920.

Dear Sir:

Your private secretary, Mr. Bradley, submitted to me the letter of Dr. Eugene A. Smith, State Geologist, who requests information relative to his authority to contract for the printing of bulletins of the geological survey.

The act approved February 13, 1919, and the act approved September 30, 1919, vest in the State Board of Control and Economy the purchasing power of all supplies for all departments and activities of the state, with certain designated exceptions. (Acts 1919, sec. 12, p. 45; sec. 17, p. 46; sec 7½, p. 1121.)

It was undoubtedly the purpose of the Legislature to have the State Board of Control and Economy make all purchases for all activities of the State, except those specifically excepted in the acts. This matter should, therefore, in my opinion, be referred to the State Board of Control and Economy, who will doubtless authorize the State Geologist to secure the most advantageous bid for the printing of the bulletins.

Yours very truly,
J. Q. SMITH,
Attorney General.

CONVICTS; SENTENCES:—A prisoner sentenced to hard labor for two or more misdemeanors at same time, sentences aggregating over two years, could be released by suing out writ of habeas corpus where there was no appeal and the term at which he was tried has expired.

Hon. C. B. Rogers,
Warden General,
Capitol.

April 16, 1920.

Dear Sir:

Your letter of the 7th instant states the following facts. A person was convicted of two or more misdemeanors and sentenced to hard labor for the county. 'The aggregate of

such sentences exceeded two years for the crime. You request to be advised the status of such person, and your duty in the premises.

Section 6583 of the Code of 1907 provides that, "No person shall be sentenced to hard labor for the county so that the aggregate of the sentences on two or more convictions shall exceed two years for the crime."

Section 7620 of the Code provides that in all cases in which the period of imprisonment in the penitentiary or hard labor for the county is more than two years, the judge must sentence such party to imprisonment in the penitentiary. The sentence of the trial court, in sentencing this person to hard labor for the county, was irregular, as the sentence should have been to the penitentiary.

Phelps v. State, 75 South. 877.
S. C., 76 South. 997.

It was within the power of the trial court to correct this irregularity and correctly re-sentence the defendant during the term of court that he was tried, or if there had been an appeal from the sentence, the appellate court would have reversed the case for a proper sentence.

Ex parte Robertson, 183 Ala. 30, 63 South. 177.

However, where there was no appeal, as in these cases, from the judgment of the court, and the term at which the party was tried has expired, the case passes beyond the control of the court, and the trial court would have no jurisdiction to impose another sentence.

Ex parte Adams, 187 Ala. 10, 65 South. 514.
Minto v. State, 9 Ala. App. 95, 64 South. 369.

It is my opinion that such persons would be discharged upon suing out a writ of habeas corpus, because of the illegality of the sentence, and the lack of power in the court to correct the irregularity of such sentence.

While no duty rests on you to initiate proceedings to test the validity of judgments of conviction in such cases, it might be advisable, if it meets with the approval of the Governor, to consider the terms of sentence for crime as a term of two years, and for costs, a period not exceeding fifteen months, the limit prescribed by statute. Upon serv-

ing out such term the prisoner might be released on the order of the Governor.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

DOG LAW:—Claims for damage to live stock or poultry may be paid from dog tax fund, notwithstanding fact that owner of dog may have been civilly liable.

April 19, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your query, asking for reply, as to whether under section 17, Acts 1919, page 1081, the State is required to pay out of the Dog Tax Fund for damage done to live stock or poultry, where the owner of the dog doing the damage is known to the owner of the live stock or poultry injured; the injury to the live stock or poultry being inflicted under such circumstances as to render the owner of the dog civilly liable for the damage done.

The Dog Tax Fund, under the above act of the Legislature, must be applied to the payment of the following items, in the order of priority named; first, to the payment of all the expenses incident to the execution of the Dog Registration Law; second, to the payment of the expenses of treatment of "poor persons, who have been bitten by mad dogs"; and, last, if at the end of the year, there is any money left in the Dog Tax Fund, this remaining amount should be appropriated pro rata to the payment of all properly proven claims for damage done to live stock or poultry.

The claim for damage to live stock or poultry must in no case be allowed, unless the amount of the damage has first been ascertained by appraisement as required by section 17 of the above act.

We do not think the existence of a cause of action against the owner of the dog bars the owner of the damaged live stock or poultry from payment of his claim out of the Dog Tax Fund; provided, of course, the claimant has made prop-

er proof and there is remaining in the Fund at the end of the year money with which to pay the claim, or a pro rata part of it.

Yours truly,
J. Q. SMITH,
Attorney General.

COUNTY EXPENSES; ACCOUNTING:—Act placing officers' claims against county in preferred class is not retroactive.

Hon. M. R. Sowell,
Clerk of the Circuit Court,
Monroeville, Alabama.

April 19, 1920.

Dear Sir:

Answering your inquiry as to whether the act approved September 30, 1919 (Acts 1919, p. 1110), placing officers' claims against the county in the preferred class, applies to officers' claims for services rendered prior to the passage of the act, I beg to advise:

It is a well settled principle of law that a statute will not be construed as retrospective in effect unless it is plain from its terms that the Legislature intended it to have such an effect. Statutes which alter a legal status have been construed as retrospective, and disfavored by the courts.

Barrington v. Barrington, 76 South. 81.

Coosa River Steamboat Co. v. Barclay & Henderson,
30 Ala. 120.

Dey v. Alabama Western Railway Co., 175 Ala. 162.

There is nothing in the act under consideration that shows any intention upon the part of the Legislature to make it affect claims for services rendered prior to its approval. It is clear that so to construe the act would make it control and affect past transactions and matters, which is such a retrospective operation as will not be given the statute by the courts unless compelled by the unequivocal terms of the act to do so.

Dey v. Alabama Western Railway Co., supra.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

SHERIFFS; REWARDS:—Sheriffs may receive rewards offered for detection and conviction of criminals in other counties.

April 19, 1920.

Hon. Thomas E. Kilby,
Governor,
Capitol.

Dear Sir:

In the case of *Smith v. Fenner*, 172 Pac. 514, the following statement was made relative to the question under consideration, to-wit:

“The rule and its qualifications are cited and discussed in *Marsh v. Express Co.*, 88 Kan. 538, 541, 129 Pac. 168, 169, L. R. A. (N. S.) 133, where it is said:

“‘It is contrary to public policy to allow an officer to recover a reward for the performance of an official duty. *Matter of Russell’s Application*, 51 Conn. 577, 50 Am. Rep. 55; *Bank v. Edmund*, 76 Ohio St. 396; 81 N. E. 641, 11 L. R. A. (N. S.) 1170, 10 Ann. Cas. 726; *United States v. Matthews*, 173 U. S. 381, 19 Sup. Ct. 413, 43 L. Ed. 738; 34 Cyc. 1753.

“‘On the other hand, no rule of public policy forbids such recovery where the officer is under no obligation arising from his official character to perform the service. *Smith v. Vernon County*, 188 Mo. 501, 87 S. W. 949, 70 L. R. A. 59, 107 Am. St. Rep. 324; *Russell et al. v. Stewart et al.*, 44 Vt. 170; 34 Cyc. 1755; 24 A. & E. Encycl. of L. 953’.”

The principles as stated in this opinion are recognized by the courts of our own state, leading law writers, and the courts of last resort of other states.

Morrell v. Quarles, 35 Ala. 544.

Hartley v. Granville, 216 Mass. 38, 102 N. E. 942.

24 A. & E. Enc. of Law (2d ed.) 952.

34 Cyc. 1754.

24 R. C. L. 1004.

The following are the facts to which these principles of law are to be applied.

A reward of \$200 was offered for the detection and conviction of persons guilty of blowing up dipping vats. The

sheriff of Blount County employed a force to perform this duty, and did detect and secure the conviction of two persons, in the courts of Etowah County, for destroying dipping vats in that county. Is it a violation of public policy to pay the offered reward for this service? In other words, was he, by reason of his official position, under obligation to perform these duties?

Our Constitution provides for the election of a sheriff for each county. (Constitution 1901, sec. 138). He is empowered to make arrests, "acting within his county" (Code 1907, sec. 6267), and he is made by law the chief conservator of the peace within the county electing him (Code 1907, sec. 7518).

Whatever duty rested on a sheriff to detect the law violators who were committing crime within Etowah County rested on the sheriff of Etowah County, and not on the sheriff of Blount County. The failure of the sheriff of Blount County to investigate criminal violations perpetrated in another county could not be charged to him as a neglect of duty.

It is my opinion that the investigation and detection of criminal violators in Etowah County were services rendered outside of and not inconsistent with the official duties of the sheriff of Blount County, and that no rule of public policy would be violated in allowing him the reward offered by the Governor for the performance of such duties.

Respectfully submitted,

HARWELL G. DAVIS,
Assistant Attorney General.

TAX ADJUSTER; WITNESS FEES:—No provision is made for compensation of witnesses summoned by tax adjuster.

April 21, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Your inquiry as to whether there is any provision for the payment of fees and mileage of witnesses summoned by the Tax Adjuster, under section 85 of the Revenue Law of 1919, has been referred to me for reply.

Section 85, above referred to, seems to contemplate an *ex parte* examination of witnesses for the purpose of eliciting evidence to guide him in the valuation of property. This examination necessarily takes place before any controversy or suit has arisen.

I can find no authority in law for compensating such a witness, nor any penalty for his refusal to testify.

The State Tax Commission, as such, has ample authority to require witnesses to testify and there is a provision for the payment of such witnesses. But, the authority of the State Tax Commission is not conferred on the Tax Adjuster.

Very truly,
HENRY P. WHITE,
Assistant Attorney General.

LICENSES:—Physician or dentist using X-Ray machine is not liable for photographer's license.

April 23, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Your inquiry as to whether a physician or dentist, who is liable for a license as such, is also liable for a photographer's license, under schedule 79, section 361, of the Revenue Act of 1919, if he makes X-ray photographs as a part of his professional work, has been referred to me for reply.

In my opinion, the physician or dentist is not liable for a photographer's license under the circumstances stated. This is so, I think, for two reasons: First, the provision as to the photographer's license is substantially a re-enactment of a similar provision in prior revenue laws and, if the legislature had intended to enlarge the scope of the word "photographer," it would have expressly said so; second, the license as a physician or dentist embraces every act essential to the practice of the profession for which the license is paid.

Yours truly,
J. Q. SMITH,
Attorney General.

LICENSES; MOTOR VEHICLES:—License is due on cars rented without driver.

April 23, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Your inquiry of the 21st instant as to what automobile license should be required of a party who rents cars, without furnishing a driver, has been referred to me.

The classification in the Revenue Law of 1919 of automobiles for "private use" and for "commercial purposes" is clearly intended to cover *all* automobiles; as the applicant for a license is required to state in his application, "whether he proposes to use the automobile for private use or for commercial purposes." And there is no intention, express or implied, that *any* automobile, except those belonging to the State and to the municipal corporations of the State, shall escape entirely the payment of a license.

In my opinion, the party renting cars, under the above circumstances, should be required to pay the license fixed by schedule 8 of section 361 of the Revenue Law.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

TAX ADJUSTER; COMPLETION OF ASSESSMENTS:—Tax adjuster should complete work in time to give three weeks notice before first Monday in June, when appeals are to be heard.

April 27, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

We have your inquiry of the 27th instant as to when the County Tax Adjuster is required to complete his work and deliver the assessment lists to the Assessor, and also as to when notice by publication must be given tax payers that the Tax Adjuster has returned his report and that the same is open for inspection.

This inquiry has been referred to me for reply. Section 88 of the Revenue Law of 1919, requiring County Tax Adjusters to complete their work and enter same on the assessment lists not later than the first Monday in May, must be construed in connection with other provisions of the same law. Section 94 of this Revenue Law provides that "the failure of the county tax adjuster or board of tax adjusters to perform any of his or its duties within the time specified by this act, shall not invalidate any assessment or any act of his or it made or done after the expiration of such time." After the County Tax Adjuster has completed his work and delivered the certified assessment lists to the tax assessor, it is then the duty of the Tax Assessor, under section 88 of the Revenue Law, to give notice by publication for three consecutive weeks that the report of the Tax Adjuster has been returned and is open for inspection and that the County Tax Adjuster will sit at the court house in the county, beginning on the first Monday in June, to correct any errors in the assessments or valuations. Section 89 of the Revenue Law requires the County Tax Adjuster to commence these hearings on the first Monday in June and to complete them not later than the second Monday in July, "*unless otherwise ordered by the State Tax Commission.*"

There is, therefore, a clear legislative recognition, in the several sections above referred to, of the possibility that the county tax adjuster may not complete his work within the time specified; and this is coupled with the express provision that the non-completion of the work within the time prescribed shall not invalidate any assessment or act of the tax adjuster made or done after the expiration of such time.

Without expressing any opinion as to how much "*overtime*" is allowed the county tax adjuster, I am convinced that, if the adjuster completes his work in time to give the required three week's notice before the first Monday in June, he has complied with the provisions of the law.

The first notice by publication must be made at least eighteen days *before* the first Monday in June. This is a mere matter of calculation.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

COSTS AND FEES; JUSTICE OF THE PEACE:—Justice of the peace cannot collect costs in cases in which he has not final jurisdiction, and defendant is discharged.

April 28, 1920.

Mr. Jno. A. May,
Justice of the Peace,
Dothan, Alabama.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 26th instant.

I do not find any authority for a justice of the peace to collect costs in cases in which the justice of the peace has not final jurisdiction and the defendant is discharged.

Section 6652 of the Code to which you refer relates only to costs and fees in preliminary trials whenever a defendant is convicted and sentenced to the penitentiary or hard labor.

Section 7488 of the Code to which you also make reference, relates to the deduction of fees only in cases in which the defendant was acquitted or was insolvent and unable to pay after conviction, and in my opinion, does not relate to a case in which the justice of the peace has no authority to acquit or convict, having only authority to bind over to the grand jury.

The result is, as I see it, that no authority is to be found unless it appears in section 6889 of the Code. This section provides for payment of fees of the *officers of court*, etc., and in *McPherson v. Boykin*, 76 Ala. 602, to which you refer, the following statement appears:

“The latter section makes the fees only of *officers of court* payable in certain cases out of the fund arising from fines and forfeitures. A justice of the peace is not an officer of the circuit court within the meaning of the statute, notwithstanding a prosecution originally instituted before him may be removed to that court.”

In the case of *Hawkins, etc. v. State*, 124 Ala. 102, to which you refer, it is held that the sheriff is not entitled to collect fees incurred in a preliminary hearing in which the defendant was discharged. In the opinion in this case

it is stated that "the statute nowhere authorizes costs growing out of prosecutions before a justice of the peace when a defendant has been discharged, to be taxed against the fine and forfeiture fund," also that "the justice of the peace has no authority to try him finally but could only discharge or bind him over to answer an indictment."

The case of *Corbin v. State*, 74 Sou. 729, which you cite, refers only to cases in which the justice of the peace has final jurisdiction, as I understand it.

I am of the opinion that there is no provision in the law for the collection of costs by a justice of the peace in cases in which he has no final jurisdiction, and in which the defendant is discharged.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

LICENSES; MOTOR VEHICLES; MISDEMEANORS:—After paying license and procuring tag, the owner of the automobile is not exercising a privilege without a license even though tag is lost, altered, or improperly placed; but for offenses regarding tags other and different penalties are imposed.

April 29, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Your letter of the 22d instant, requires an answer to the following questions:

First: If the owner of a motor vehicle has lost his tag, after procuring a proper license, can he still operate the car without subjecting himself to the penalty prescribed for exercising a privilege without a license therefor?

Second: If not liable to the penalty above mentioned, does he subject himself to any criminal prosecution by operating the motor vehicle without displaying the tag in a conspicuous place on the rear of the motor vehicle?

Answering these questions in inverse order:

Our first motor vehicle registration law was passed by the Legislature of 1911 (Acts 1911, page 634). Section 10 of this act provided that:

"No person shall drive a motor vehicle on the public highways of this State after the 1st of October, 1911, unless such vehicle shall have the certificate of registration assigned to it by the secretary of the State conspicuously displayed on the rear of such vehicle, securely fastened."

Section 28 of this same law provides that:

"Any person violating any of the provisions of any section of this act, for which violation no punishment has been specified, shall be guilty of a misdemeanor, punishable by fine of not exceeding twenty-five dollars for the first offense and by a fine not in excess of five hundred dollars for any subsequent offense."

The Legislature of 1915 changed the original law as to the amount of license required of motor vehicles and transferring the duties as to the issuance of tags to the State Board of Equalization and the probate judges of the State. (See Acts 1915, page 492). The law of 1915 did not in terms, or by necessary implication, repeal any part of the original law of 1911 except that relating to the registration and issuance of motor vehicle licenses and the amount thereof. This excepted part, however, was repealed by the act of 1915, as held by the Court of Appeals in *Foshee v. State*, 72 South. 685. The motor vehicle registration act of 1919 (Acts 1919, page 398) encroaches very much more extensively on the field covered by the act of 1911. This last named act has the following, among other, provisions:

1st: "The numbered license or tag shall be placed in a conspicuous place on the rear of the automobile or motor vehicle." (Schedule 9, sec. 361).

2d: "It shall be a misdemeanor punishable by a fine not exceeding twenty-five dollars for each offense to display the tag on any place other than the rear of the motor vehicle." (Schedule 9, sec. 361).

3d: "It shall be unlawful for any person to mutilate or alter for the purpose of deception any motor vehicle tag provided for by this act. It shall also be unlawful for any person to use upon his car any tag in imitation of or substitution for real tags lawfully

issued. It shall be the duty of all sheriffs, police officers and license inspectors to arrest persons violating these two preceding provisions, and a fine not exceeding fifty dollars may be imposed for each offense."

The original law of 1911 has provisions requiring the stopping of a motor vehicle on signal, and other rules of the road, which evidently have not been repealed by any subsequent legislation. Unless, therefore, the law of 1919 was intended to cover the whole subject as to the display of tags or operation of motor vehicles without any display of tags, then sections 10 and 28 of the law of 1911 are still in force and effect.

In view of the evident legislative intent, as expressed in the law of 1919, to multiply and subdivide the offenses as to the display of tags, and in further view of the fact that the laws of 1911 and 1919 are not in conflict in this respect, I have arrived at the following conclusions:

1st: If a person, after having procured a tag, operates a motor vehicle, without displaying any tag, he has violated section 10 of the act of 1911 and is subject to the penalty prescribed by section 28 of said act.

2d: If this same person *displays* the tag, on any place other than the rear of the motor vehicle, he has subjected himself to the penalty prescribed in schedule 9, section 361, of the Revenue Law of 1919.

3d: If this same person mutilates or alters any motor vehicle tag for the purpose of deception, or, if he uses upon his car any tag in imitation of or substitution for real tags lawfully issued, he is liable for the penalty prescribed in schedule 9, section 361, of the Revenue Law of 1919.

As the above penal provisions cover every offense concerning the display or non-display of a tag, which may occur after the procurement of the tag, I am convinced that the operation of a car, after obtaining a proper license therefor, cannot under any circumstances render the owner of the car liable for exercising a privilege without a license.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

LICENSES; CONTRACTORS:—Mere superintendent of construction is not a contractor.

April 30, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

In your letter of April 27, you ask whether a person who simply superintends the construction of a building, for a stated compensation (the owner paying for all the material and labor), is required to take a license as a contractor under schedule 34, section 361, of the Revenue Law of 1919; and, if so, whether the amount of his license is based on the salary paid him, or on the entire cost of the building.

The above mentioned schedule of the Revenue Law provides that "any person, etc., accepting orders or contracts for doing any work on or in any building," etc., shall be deemed a contractor. It further provides that the license required of such contractor shall be based on the "gross amount of all orders or contracts accepted" during the year.

In my opinion, this law intends to impose a license only on persons who contract to do the work specified for a stipulated sum, and not on a mere employee or agent of the owner, who simply agrees to perform certain services for a stated compensation. In other words, the license is intended to be levied on an independent contractor, and not on an employee or agent.

Yours truly,
J. Q. SMITH,
Attorney General.

TAXATION; REAL ESTATE DESCRIPTIONS:—Setting out what constitutes sufficient description of real estate for purposes of assessment.

May 3, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

In your letter of April 27th, you ask to be advised what is "a sufficient description of real estate," that is required

to be furnished to the tax assessor by the tax payer, under section 44 of the Revenue Law of 1919. The Attorney General has instructed me to answer your inquiry.

Section 50 of the Revenue Law prescribes the following rules as to the description of real estate:

"Section 50. The description of real estate may be as follows: 1. If it is an entire section, it may be described by the number of the section, township and range. 2. If it is a subdivision of a section authorized by the United States for the sale of public lands, it may be described by a designation of such subdivision, with the number of the section, township and range. 3. If it is less or other than a subdivision, it may be described by metes and bounds, or in some way by which it may be known. 4. If it is in a city, town or village, surveyed and laid off, and a plat thereof is recorded in the office of the judge of probate of the county, or if a plat is accessible, and if it is as a whole lot or block, it shall be described by the designation of the number thereof, and if it is in a part of a whole lot or block, it may be described by metes and bounds, or in some other way by which it may be known, and it shall not be necessary to insert the quantity of such land in the assessment. 5. If it is a tract of which the subdivision is not known to the assessor, it may be described by metes and bounds, or in some other way prescribed by the State Tax Commission by which it may be known or identified. 6. It shall be sufficient to describe lands to be assessed or sold for taxes by initials, abbreviations and figures. 7. Mineral and timber interests, when they have been severed in ownership from the soil by sale, or otherwise, shall be separately returned for assessment. 8. If the surface right only is assessed, for taxation, the description of the land may be preceded or followed by the letters S. R., and if the mineral interest only is assessed, the description of the land may be preceded or followed by the letters M. R."

The above rules are simply re-enactments of substantially similar provisions in previous revenue laws. The only material change made by the law of 1919, is in subdivision

5, of section 50, above quoted, which authorizes the State Tax Commission to prescribe a method of describing "a tract of which the subdivision is not known to the assessor."

It may be laid down first, as a broad proposition, that a "*sufficient description*" of real estate is one which complies with the rules above set out.

No question as to what is a sufficient description is likely to arise, except in the instances named in subdivisions 3, 4 and 5 of section 50. That is, in those cases where the real estate is a *part* of a government subdivision, or a part of a lot or block in a town or city, or where the subdivision is not known to the assessor.

For the purpose of arriving at a workable rule, I give below a short summary of our decisions on the description of land in assessments.

The following descriptions have been held insufficient:

1. The designating of the range number as 19, instead of 18—this being the only difference between the proper description and the description in the assessment. *Oliver v. Robinson*, 58 Ala. 46.

2. "Two hundred acres of land lying in Dale County" was held insufficient in *Driggers v. Cassady*, 71 Ala. 529. The opinion in this case lays down this rule. "The object of all description is designation and identification. The usual rule, therefore, is, that the lands assessed must be described with such accuracy and certainty as to be capable of an easy identification. * * * It is impossible to locate these lands by a description so general and indefinite as 'two hundred acres of land lying in Dale County.' It is void for uncertainty."

3. The assessment of "a house and lot on Battle Street, in the town of Talladega," as the property of Pelham, is insufficient, when the evidence shows that Pelham owned another house and lot on the same street. "The description affords no data by which to ascertain what house and lot on Battle Street is intended. * * * The assessment is the foundation of all subsequent proceedings, and, in order to impart certainty and validity to them, the description of the land must be sufficiently definite and certain as not to

require resort to extrinsic proof, *unless the description in the assessment furnishes the means of more exact identification by the aid of such evidence.*"—Jones v. Pelham, 84 Ala. 208.

4. From opinion in Dane v. Glennon, 72 Ala. 160: "The land described in the assessment and tax deed is as follows: 'Two-thirds of Square 39 in Fisher tract.' The ambiguity patent on the face of this description is obvious. It may mean (1) an undivided two-thirds interest, held by the owner, Fisher, by way of tenancy in common; or (2) it may mean an entirety of two-thirds in area of the whole square. Which of the two is intended, it is impossible to say; and the ambiguity being patent cannot be corrected by the introduction of extrinsic or parol evidence * * * *. The description must afford the means of identification, and be sufficiently certain not to mislead the owner, or be calculated to mislead him."

5. An assessment against property described as 'V. C. N. E. Cedar & Tennessee' is insufficient for indefiniteness. Smith v. Cox, 115 Ala. 503, 22 Sou. 78.

On the other hand, it has been held that an assessment of "two hundred acres of land, known as the lands of the late Israel Wiggins, deceased" is sufficient. This on the theory that it was a mere indefinite description, capable of being rendered certain by parol proof. Driggers v. Casady, 71 Ala. 529. It will be noted that the description itself suggests the means of a more exact identification of the land, and, in Lodge v. Wilkerson, 174 Ala. 134, it was intimated, though not decided, that an assessment of the "Hotel Notasulga" may be sufficient, if oral proof is furnished that the tax payer owned only one hotel and lot in the town of Notasulga.

The true rule, deduced from the above decisions, is that the description *itself* must either exactly identify the land, or it must furnish the means of a more exact identification. In the first instance, no proof outside of the description is necessary. In the second instance, only that oral proof is permissible which is suggested by the description.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

TAXATION; LICENSES:—Railway news dealers not allowed to sell cigarettes, soft drinks, or playing cards under license covering periodicals, candy, fruit, and like articles, but must take out separate licenses for sale of articles for which license is required.

May 4, 1920.

The State Tax Commission,
Capitol.

Gentlemen:

You ask this office to give you an opinion as to whether or not, under schedule 72 of section 361 of the Revenue Law of 1919, cigarettes, cigarette tobacco, cigars, soft drinks, or playing cards may be sold on railroad trains in this State.

Schedule 72 above referred to, requires a license of "every person, firm or corporation engaged in the business of selling on railroad trains in this State, newspapers, periodicals, magazines, candy, fruits, and articles of like character."

In my opinion, the sale of cigarettes, cigarette tobacco, cigars, soft drinks, or playing cards, is not expressly authorized under the license levied by schedule 72. Nor are any of these articles embraced in the expression "and articles of like character." The sale of such articles, however, is not dependent on a license. Unless, therefore, a license is specifically required for the sale of cigarettes, etc., on railroad trains, such articles may be sold without the payment of any license. Schedule 72 requires a license for the sale of the articles therein named and does not prohibit the sale of other articles *not* named, without a license.

Your question, therefore, really resolves itself into an inquiry as to whether a license for the sale of cigarettes, etc., on railroad trains is fixed by any other provision of the Revenue Law.

Schedule 23 of section 361 levies this license on dealers in cards: "For each dealer in playing cards or dice," etc. This language has no limitation as to the place of sale.

Schedule 25 of section 361, which levies a license on "every dealer who may sell or give away cigarettes, cigarette paper or cigarette tobacco," likewise has no limitation as to the place of sale.

Schedule 96 of section 361, requires a license of each person engaged in the business of selling at retail bottled soft

drinks, and there is in this schedule no limitation as to the place of sale.

The license on cigar dealers, fixed by schedule 124 of section 361, is required only of dealers located in cities of certain population.

I am of the opinion, therefore, that cigarettes, cigarette tobacco, bottled soft drinks, or playing cards, cannot be sold on railroad trains in this State, without the payment of the license required in the above schedules.

I am also of the opinion that no license is required for the sale of cigars on railroad trains in this State.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

ALABAMA POLYTECHNIC INSTITUTE:—Funds of Institute may be deposited in some bank with arrangement for interest on daily balances.

May 7, 1920.

Hon. Thomas E. Kilby,
Governor,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of May 6, in which you request to be advised whether or not the Alabama Polytechnic Institute can legally receive interest on its daily balance of bank deposits.

I know of no reason why the trustees of this institution should not designate some bank as a depository for the funds of this institution, and make an arrangement for interest on daily balances of bank deposits. In my judgment the board should require adequate bond of said bank to secure the safety of said deposits. Said bond should be fixed having due regard to the safety of the funds of this institution.

Very truly,
J. Q. SMITH,
Attorney General.

FEDERAL TAXES; STATE HIGHWAY DEPARTMENT:—Highway Department should pay excise tax on automobile truck parts purchased.

May 15, 1920.

Mr. W. A. McCalla,
Principal Assistant Engineer,
Bell Bldg., Montgomery, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 13th inst., with reference to war excise tax of \$7.97.

Section 900 of the 1918 Federal Revenue Act provides as follows:

"Section 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased * * * * *.

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor), three percentum:"

It will be observed from the provisions of the statute above quoted that a 3% tax is provided for, but it appears from the face of the bill that more than that amount is charged as the excise tax on the amount of the bill.

Subdivision 10 of section 900 of the revenue act is confined to fire arms, shells and cartridges, as to which an exception is provided in cases where sales are made to a State.

Inasmuch as the 3% tax is provided for on automobiles truck parts, and no exemption appears to be therein made in favor of the State, it seems to me that there is a liability for the tax in this case, limited, however, as I understand it, to a 3% tax.

The papers are returned herewith.

Very truly yours,

J. Q. SMITH,
Attorney General.

LICENSES; LABOR AGENTS:—Each person employed in business of soliciting labor should take out a separate license.

The State Tax Commission,
Capitol.

May 15, 1920.

Gentlemen:

Your letter of the 14th instant, asks for the Attorney General's construction of schedule 129 of section 361 of the Revenue Law of 1919, in regard to licensing Labor Agents.

You ask whether a corporation, organized for the purpose of acting as a labor agent, can carry on this business through its agents under the *one* license issued in the name of the corporation.

This schedule provides that "each person engaged in the business of hiring or soliciting laborers to go or to be employed outside of Alabama shall be a labor agent within the meaning of this schedule;" and there is the further provision that "all assistants, sub-agents, associates or employes of any such person shall be subject to the license hereby levied, whether such license be paid by their employer, principal, partner, associate or not." The intention seems plain that a separate license is required of each person who solicits laborers, whether such a person is a principal, a partner, an agent, an associate, or an employee. In my opinion, therefore, a license taken out in the name of the corporation will furnish no protection to the person who acts for the corporation. This proviso seems to have been put in for the purpose of meeting just such a contingency as is suggested in your letter.

Yours truly,
J. Q. SMITH,
Attorney General.

ROAD BONDS; LICENSES; VEHICLE TAX:—Counties and municipalities are allowed to receive the part of the motor vehicle tax allotted to them under the Revenue Act of 1919.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

May 18, 1920.

Dear Sir:

I beg to reply to the following inquiry: Does the constitutional amendment providing for the exclusive use of

the State motor vehicle license prevent the counties and cities from receiving any part of such license?

This inquiry necessitates the construction of the following provision of said constitutional amendment:

“B. That for the purpose of securing the prompt payment of the principal and interest of said bonds to provide a sinking fund therefor, to place sufficient revenue in said State road and bridges fund, and to defray the cost of constructing and maintaining said State Highways public roads and bridges continuously in a highly serviceable condition that a State license tax on all automobiles or motor driven vehicles is hereby authorized to be levied and collected *on* all such vehicle privilege license tax now levied or which may hereafter be levied by law of every kind and description, shall be exclusively used for the payment of said bonds, principal and interest, for creating a sinking fund for their maturity and the remainder for the maintenance of said public Highways, roads and bridges and extension of the State Highway System.” (Acts 1919, page 890.)

It is very clear that the word “on” which is *italicized* in the foregoing quoted provision is a typographical error and should read “and.”

State v. Bracken, 154 Ala. 151, 45 South. 841.

Hooper v. Birchfield, 115 Ala. 226, 22 South. 68.

This amendment provides that it shall go into effect immediately upon adoption. It does not attempt to levy the tax but adopts the license tax enacted prior to its submission. This adopted law provided for a certain part to be paid to the county or municipality. There is nothing in the constitutional provision changing this proportion of distribution unless it is the phrase, “such vehicle license tax * * * shall be exclusively used for the payment of said bonds,” etc. “Such” refers to state license tax, its last antecedent, and state license tax was undoubtedly intended to cover that part of the license tax levied for state purposes. The levy made in the revenue act was for state, county and municipal purposes. If it had not been, it

would have been unconstitutional and we would have no levy of such license tax.

Ex parte Bozeman, 183 Ala. 91, 63 South. 201.

This was undoubtedly realized by the law makers, and when writing the constitutional provision to adopt the present levy, they would have provided for the modification of that term if it had been so intended.

Under section 221 of the Constitution of 1901, the state was not permitted to allow the payment of a tax to the state and deprive the county and municipality from levying its tax. The purpose of this section was to preserve to the counties and municipalities their right to resources to defray the expense of the protection accorded by them. There is nothing in the constitutional provision now under consideration that clearly and unequivocally indicates a purpose to change this policy as to this specific license tax. There is a field of operation for both without conflict.

In my opinion, therefore, counties and municipalities are entitled to receive the per centum of the motor vehicle license tax allotted to them under the provision of the revenue act of 1919.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

COUNTY EXPENSE:—County should pay for land and lot books prescribed by State Tax Commission.

May 20, 1920.

Mr. W. L. Acuff,
County Treasurer,
Columbiana, Ala.

Dear Sir:

Governor Kilby has requested this office to advise you whether the county is liable for the cost of land and lot books prescribed by the State Tax Commission.

If you will refer to the general Acts of 1919, pp. 310 and 311, section 83, you will find the following provision:

“The form of such land and lot book shall be prescribed by the State Tax Commission and such Commission shall, after thirty days’ notice by advertise-

ment once a week for four consecutive weeks in one daily newspaper published in Birmingham, one published in Montgomery, and one published in Mobile, award a contract to the lowest responsible bidder, who shall agree to furnish said books of the quality, in the form and within the time stipulated by the State Tax Commission, to all counties of the State. The cost of said books shall be paid by the respective counties upon the certificate of the State Tax Commission."

The law seems plain and, in my opinion, the county is liable for the cost of the books furnished it under the above provision.

Yours truly,
J. Q. SMITH,
Attorney General.

STATE ROAD BONDS; ACCOUNTING; STATE HIGHWAY DEPARTMENT:—Funds derived from motor vehicle licenses are immediately available for road construction, prior to disposition of road bonds authorized by article XX of the Constitution.

May 21, 1920.

Hon. W. S. Keller, Engineer,
State Highway Department,
Bell Building, Montgomery, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter requesting to be advised whether there is anything in the State Highway Law approved September 30, 1919, or in the amendment to the Constitution, which would prevent the State Highway Commission from using any fund to the credit of the State Highway Department for the construction of roads until the State is able to dispose of the road bonds.

The act creating the State Highway Department and defining its powers (Acts 1919, page 890), and the act submitting to the qualified electors of this State for adoption Article XX of the Constitution (Acts 1919, page 787), were enacted about the same time and approved on the same day, September 30, 1919. Both related to the construction and maintenance of public highways, and both

provided that the State's portion of the moneys derived from the sale of motor vehicle licenses should constitute a fund for that purpose. The act creating the Highway Department made this license fund available immediately upon approval of the act, but provided that, "in the event that the State shall issue and sell bonds for the construction of public roads the appropriation herein made shall be used for the payment of interest on said bonds and maintenance of roads and provide a sinking fund." Section 8, Acts 1919, page 893.)

This clause undoubtedly refers to the anticipated adoption of Article XX of the Constitution, for the issuance of bonds for that purpose was not permitted under the Constitution as it existed at the time of the passage and approval of this act.

It will also be noticed that subdivision G of section 3 of Article XX (Acts 1919, page 787) provides that this article of the Constitution shall become self-executing upon its adoption, and that the legislature submitting it to the vote of the people could adopt laws securing the full benefit thereof.

Constitutional provisions are construed in the light of existing legislation; and concurrent legislation, especially when closely related and interwoven, as is this Article XX of the Constitution with the act creating the State Highway Department, amounts to a legislative construction of the meaning of the constitutional provision, which should control, unless it is clearly invalid because violative thereof.

Taylor v. Woods, 42 Ala. 474.

Ex parte Selma & G. R. Co., 45 Ala. 696.

The funds derived from the motor vehicle licenses were immediately available for constructing and maintaining roads upon the approval of the act creating the Highway Department. Nothing in the constitutional amendment, Article XX, adopted thereafter, contravenes this provision, but this article provides, as did section 8 of the Highway Department Act, that upon the issuance of bonds for road purposes the motor vehicle license funds should be charged with the payment of the interest thereon, etc.

It is my opinion, therefore, that the funds of the Highway Department are available for the construction and

maintenance of roads and bridges prior to the disposition of the bonds authorized by Article XX of the Constitution.

Yours very truly,

HARWELL G. DAVIS,
Assistant Attorney General.

REGISTRATION AND ELECTIONS:—Election Commissioners are entitled to \$3.00 a day for services rendered except during sixty-day period immediately preceding a primary or general election.

May 21, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 21st instant concerning the compensation to be paid by the State to election commissioners for registering voters in counties having more than 100,000 population.

The appointment of an election commissioner, in counties having more than 100,000 population, by the Governor is provided for in section 34 of the act cited in your letter.

By the provisions of Section 35 of the act such election commissioner "shall devote his entire time to the performance of the duties of his office, and shall receive a salary to be fixed by the Board of Revenue, or Board of like authority in said county, said salary not to exceed the sum of \$1800 per annum. For each actual working day spent by said registrar for the purpose of registering voters, the State shall pay \$3.00; the balance of his salary, after deducting the amount so paid by the State, shall be paid out of the funds of the county treasurer in the same manner as other county officers are paid."

By the provisions of section 37 of the Act such election commissioners are required to perform all duties required of registrars, and he "shall also sit at his office at the court house for such time between the first day of February and the first day of October of each year as may be necessary to make a complete registration of all persons entitled to register." During this period, "for each actual working day spent by said register for the purpose of registering voters the State shall pay \$3.00."

Under the provisions of section 15 of the act, as amended, it is provided that "the Board of County Commissioners or Board of like authority may authorize the registrar to sit at the county seat and register qualified voters at any time except within the sixty days immediately preceding any primary or general election."

As I construe the provisions of this act an election commissioner is entitled to \$3.00 per day to be paid out of the State treasury for each day's services rendered between February first and October first of each year, and the same amount for services rendered at other times found necessary by the Board of county commissioners, evidenced by an order upon the minutes at any time during the year save during the period of sixty days immediately preceding a primary or general election. During this sixty day period no authority can be conferred upon the election commissioner to sit at the courthouse and register voters. He cannot therefore be paid \$3.00 per day for any day during that period.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

COUNTY OFFICERS; DEFALCATION:—When examiner of accounts discovers default of county officer, the duty formerly devolving upon the county treasurer to institute proceedings has been laid upon the president of the court of county commissioners.

May 22, 1920.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol.

Dear Sir:

Replying to your inquiry relative to who is the proper party to institute proceedings against defaulters of county funds, I beg to advise as follows:

That section 6 of the act approved September 15, 1915, (Acts 1915, p. 348), provides that:

"All acts required by law to be performed by the county treasurer, outside of the receipts and disburse-

ments of the county funds, shall be performed by the president of the board of revenue or court of county commissioners of the county."

One of the duties formerly devolving upon the county treasurer and transferred by this act to the president of the board of revenue or court of county commissioners was the duty to institute proceedings against defaulters of county funds (subdivision 10, section 211, Code of 1907). The probate judge as the president of the court of county commissioners, has the authority, and it is his duty, to institute proceedings against defaulters of county funds, in all cases not otherwise specially provided for.

Section 9 of the act creating the Department of Examiners of Accounts (Acts 1919, page 813), provides that the examiner issue notice to an officer requiring him to show cause why he should not pay the amount found due by the examination of his accounts, and that in the event suit is necessary to recover funds belonging to the county the solicitor should bring suit against the officer and his bondsmen to recover the same. This provision in no wise conflicts with the general rule requiring the probate judge to institute such proceedings, but is an exception to such general rule and provides the manner of proceeding under the special circumstances enumerated in the act.

It is my opinion, therefore, that when an examination by an examiner of public accounts discloses that an officer is in default to a county, the method of procedure prescribed in the act creating the Department of Examiners of Accounts should be followed and that in all other cases, not specially provided for, the probate judge, as the president of the court of county commissioners, is charged with the duty of instituting such proceedings.

Yours very truly,

J. Q. SMITH,
Attorney General.

SHERIFFS; DEPUTY SHERIFFS; COUNTY COMMISSIONERS:—

Where sheriffs are directed to make special investigations, the court of county commissioners has authority to allow the expense of such investigation, including compensation of deputies.

May 22, 1920.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol.

Dear Sir:

I beg to reply to your letter inquiring whether the Court of County Commissioners of Chilton County is authorized to allow claims for the employment of deputy sheriffs to investigate criminal violations.

Courts of County Commissioners have no general authority to pay for the employment of special deputy sheriffs. However, where sheriffs are directed in writing by the solicitor, the Attorney General, or the Governor to make special investigations of alleged violation, the Court of County Commissioners has authority to allow the expenses of such investigation. To legalize such an allowance there should be a strict compliance with section 2 of the act approved August 25, 1909 (Acts 1909, page 107).

Yours very truly,

J. Q. SMITH,
Attorney General.

STATE HEALTH DEPARTMENT; PHYSICIANS:—Men belonging to Medical Service Corps are not entitled to certificate to practice medicine in Alabama without examination.

May 26, 1920.

Dr. S. W. Welch,
State Health Officer,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of May 22d, in which you ask to be advised whether or not men belonging to the Medical Service Corps, and who have seen foreign service, are entitled to certificates to practice medicine in Alabama without an examination before the State Board of Medical Examiners.

The only provisions of law I find on this subject are sections 6334, 6335 and 6336 of the Code of 1907. These sections do not permit the class of persons you refer to in your letter to engage in the practice of medicine without a license.

You will note that section 1636 provides that the State Board of Medical Examiners may issue to a surgeon or assistant surgeon of the United States Army or Navy or of the United States Health and Marine Hospital Service, a certificate without examination, etc. It seems that the Medical Service Corps which you mention in your letter does not come within the influence of this section.

Very truly,
J. Q. SMITH,
Attorney General.

TAXATION; EXEMPTIONS FROM AD VALOREM TAXATION:—

Exemption of \$150 is based on actual value and not on sixty per cent of value.

May 29, 1920.

State Tax Commission,
Capitol.

Gentlemen:

Section 2 of the Revenue Law of 1919, contains the following, among other exemptions from ad valorem taxation:

(a) Farming tools to the value of twenty-five dollars; (b) tools and implements of mechanics to the value of twenty-five dollars; (c) cows, calves, hogs, sheep, poultry, household and kitchen furniture, and sewing machines, to be selected by the head of the family, and not to exceed in the aggregate one hundred and fifty dollars.

You ask whether these exemptions are fixed according to the full market value of the items exempted, or whether the 60 per cent basis is used in arriving at the amount of the exemptions. In other words, does the exemption of "farming tools, etc., to the value of twenty-five dollars" mean that amount in *actual* value, or is the tax payer allowed an actual exemption in value of \$41.66 2-3? In short, is the tax payer allowed such a sum in *value* as that 60 per cent of it will produce the amount of the exemption named in the statute.

All exemptions from taxation are construed strongly against the party claiming it and cannot extend beyond the necessary implications of the law granting them. *Brown Ins. Com. v. Protective Life Ins. Co.*, 188 Ala. 166.

Section 7 of the Revenue Law of 1919, which requires "all taxable property" to be assessed "*for the purpose of taxation*" at 60 per cent of its fair and reasonable cash value, cannot fairly be construed as enlarging the exemption given in section 2 of this law. Each section has an independent field for operation. One refers to property *exempt* from taxation. The other refers to property *assessed for taxation*.

I am of the opinion, therefore, that in arriving at the amount of exemption allowed by section 2, the taxing authorities must use as a basis for their calculation the full cash value of the property claimed as exempt.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

INSURANCE; FOREIGN INSURANCE COMPANY; CORPORATIONS:—Foreign insurance companies must file with Secretary of State certified copy of articles of incorporation, make statement of place of business and authorized agent, and name the Insurance Commissioner as agent to receive service while it has any liability outstanding in Alabama.

June 1, 1920.

Hon. A. W. Briscoe,
Commissioner of Insurance,
Capitol.

Dear Sir:

You request an opinion on the following inquiry:

Does a compliance by a foreign insurance company with section 4560 of the Code of 1907 constitute a compliance with section 232 of the Constitution of 1901, and section 3642 of the Code, and Acts 1919, p. 831, amending section 3643 of the Code? Does a compliance with either of these sections of the Code constitute a compliance with the requirements of said section 232 of the Constitution? What is the field of operation of each section?

Section 232 of the Constitution of 1901 is as follows:

“No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein, and without filing with the Secretary of State a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by serving of process upon an agent anywhere in the State. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax.”

This section requires two things of a foreign corporation as prerequisite to its doing business in the state: (1) that it have a known place of business and authorized agent, and (2) that it file with the Secretary of State a certified copy of its articles of incorporation or association. It specifically provides that the articles of incorporation or association must be filed with the Secretary of State and a compliance with this mandate is a prerequisite to its authority or right to do business in the State. It has been held that this section is self-executing, and needs no legislative enactment to put it into operation. Being a part of the Constitution, its requirements are unalterable, and the filing of such articles with any other officer except the Secretary of State would not constitute a compliance with the requirement. Therefore a compliance with either section 3642 and 3643 as amended, or section 4560, of the Code of 1907, does not relieve a foreign insurance company from filing with the Secretary of State its articles of incorporation or association.

A. U. Tel. Co. v. W. U. Tel Co., 67 Ala. 27.

Farrior v. W. E. Mortg. Sec. Co., 88 Ala. 275.

While section 232 of the Constitution expressly provides with what office the articles of incorporation should be filed, yet it is silent as to the manner in which a foreign

corporation should make known its place of business and authorized agent in the state.

New England Security Co. v. Ingram, 91 Ala. 337.

It was therefore competent and expedient for the Legislature to prescribe the method of making such facts known, and this it did by section 3642 and Acts 1919, p. 831, amending section 3643 of the Code of 1907. A compliance with these sections is also prerequisite to such companies' right to do business in Alabama.

Ewart Lumber Co. v. American Cement Plaster Co.,
9 Ala. App. 152, 62 South. 560.

In addition to a compliance with the sections of the Code and the Constitution just discussed, an insurance company must comply with section 4560 of the Code of 1907. This section has for its purpose the providing a way to secure service on companies that have ceased to do business in the state, that suits may be maintained in the courts of this State for such liabilities as are outstanding in the state. A compliance with this section in no way constitutes a compliance with the sections heretofore considered.

Lewis v. International Ins. Co., 198 Ala. 411, 73 South. 629.

It is my opinion, therefore, that the compliance with section 4560 does not relieve a foreign insurance company from compliance with Code sections 3642 and 3643 (as amended) and with section 232 of the Constitution, but that such company is required to—

(1) File with the Secretary of State a certified copy of its articles of incorporation or association;

(2) Make known its place of business and authorized agent by complying with Code section 3642 and section 3643 as amended by Acts 1919, p. 831; and

(3) Constitute the Insurance Commissioner its legal agent to receive legal service as long as the company has any liability outstanding in the State, as required by section 4560 of the Code of 1907.

Yours very truly,

HARWELL G. DAVIS,
Assistant Attorney General.

SOLICITORS; MONTGOMERY COUNTY:—Assistant solicitor may not be employed under Act providing for office equipment and conveniences.

June 2, 1920.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol.

Dear Sir:

I beg to reply to the following inquiry:

Does the local act approved August 28, 1915, empowering the Board of Revenue of Montgomery County to furnish the several offices of said county with equipment and conveniences, including janitor service and telephone service," authorize the employment of a special assistant for the solicitor?

From the context of the statute, the word "office," as used therein, means a room or apartment of the county, in which the public officers transact their business, and not the position of trust held by an officer.

Harrison v. State, ex rel. etc., 76 South. 422.

Anderson v. State, 17 Texas App. 305.

The statute therefore simply authorizes the furnishing of the several rooms or apartments occupied by the officers with equipment and conveniences. A special agent of the solicitor could hardly be said to be an equipment or convenience as contemplated by the statute.

It is my opinion, therefore, that the Board of Revenue of Montgomery County was without authority under said act to employ a special assistant to the solicitor and allow a salary for his services.

Yours very truly,

J. Q. SMITH,
Attorney General.

LICENSE INSPECTORS; PISTOLS:—License inspectors are not such officers as are permitted by law to carry pistols.

June 2, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

License inspectors, under section 366 of the Revenue Law of 1919, have the same power and authority to arrest persons violating the revenue laws of the State as is now vested in the sheriffs of the State.

You ask whether in the exercise of this authority to arrest persons they are permitted to carry a pistol. The Act of 1919, regulating the right to carry a pistol in this State, specifically allows a sheriff, deputy sheriff, police officer of incorporated town, United States Marshal or his deputies, and rural mail carriers to carry a pistol unconcealed, when in the discharge of their duties as such. A license inspector is not named as one of the officers permitted to carry a pistol. The authority gives a license inspector under another law to make arrests cannot, in my opinion, include by implication the right to carry a pistol. A contrary construction would really amount to amending our pistol law.

Yours truly,

J. Q. SMITH,
Attorney General.

TAXATION; MUNICIPALITIES:—Municipality is not subject to license tax for operating water works system.

June 2, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You ask whether a municipality operating a water works system is subject to the license tax levied by schedule 89, section 361 of the Revenue Law of 1919. This inquiry has been referred to me for reply.

In *City of Huntsville v. Madison County*, 166 Ala. 391, our Supreme Court uses this language:

"But, while there is a conflict, the weight, and, we think, the sounder authorities, hold that general language in a statute giving cities power to levy assessments for street improvements is not sufficient to embrace the property of the State or county which is devoted to strictly public uses, nor authorize the enforcement of such special assessments against it under a general judgment against the county. In other words, property owned and held by the State and counties for public purposes is generally exempt from taxation of any description, and is not to be deemed subject to taxation in any form, unless the intent of the legislature to render it so clearly appears. * * * The fact that county property is included in the exemptions from general taxation by the terms of section 2061 of the Code of 1907 is no indication that it was intended to be subject to this special tax. It was exempt regardless of this statute, and was doubtless included in the schedule with other property not necessarily exempt, independent of the statute, and for the purpose of setting forth all exempt property."

The same principle was again announced in *Griel Bros. v. City of Montgomery*, 182 Ala. 291.

In the light of these cases, I am unable to see in the statute a clearly expressed intention to subject municipalities to this license tax. The license is levied on "each *person, firm* or corporation." The term "person," as used in the statute, includes firms, companies, associations and corporations. (See sec. 1 of Revenue Law of 1919). A municipality, therefore, to be taxed under this schedule, must be taken as embraced in the term "corporation." That term, however, in my opinion, refers only to private corporations and not to political subdivisions of the State. I am strengthened in this conclusion by the fact that the same schedule which levies this license tax also authorizes municipalities to levy a like license tax.

I am of the opinion, therefore, that a municipality is not subject to this license tax.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

TAXATION:—Person leaving the State should be required immediately to pay taxes on stock of merchandise or other assessed property.

June 2, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sirs:

You submit the following statement of facts: A merchant in Alabama correctly assessed his stock of merchandise on October 1, 1919. He has since sold the entire stock of merchandise and has himself moved to Mexico.

You wish to be advised whether under this state of facts the State can now exact payment of the tax, which ordinarily does not become due until October 1st, 1920.

Section 74 of the Revenue Law of 1919, provides that "When the assessor has reason to believe that any person, who has been assessed is about to leave the county, he shall at once notify the tax collector, in writing, and, on his failure to do so, he shall be liable for the full amount of the taxes due, or to become due on such assessment." Section 222 of the Revenue Law renders the tax collector liable for the amount of the taxes assessed against such person, if he fails to act when notified that such person is about to leave the county. Section 221 of the Revenue Law makes it the duty of the tax collector, whenever upon information or otherwise, he has good reason to believe that any person owing taxes, whether due or not, is about to leave or remove his property from the county, and thereby the collection of such taxes is endangered, to make out and certify to the probate judge a bill against such person for the amount of such taxes and any fees due the assessor or collector. This bill, when approved in writing by the probate judge, shall operate as a writ in *fieri facias*, which the collector is authorized to execute by levy and sale in the same manner as sheriffs are authorized to execute such writs when issued out of the circuit court. Section 223 covers the case where a person owing taxes has removed to another county in this State.

The spirit and intent of these several provisions are to prevent any loss to the State in taxes by the removal of the

person or property from the jurisdiction where the assessment was made. It was certainly never intended to penalize a person "about to leave" and relieve the person who has actually left. In my opinion, it is the duty of the tax collector, under section 221 above referred to, to make out a bill for the taxes due on this stock of merchandise and, after the approval of same by the probate judge, to make *immediate* collection of the taxes in the manner provided.

Yours truly,

HENRY P. WHITE,
Assistant Attorney General.

TRIAL TAX:—Trial tax fee should not be charged in cases involving forfeiture of bond, as they are only branches of the original case.

June 4, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of the 1st instant.

I am of the opinion that the trial tax fee of three dollars would not be chargeable in the two cases involving forfeiture of bond.

As I understand it, the trial tax fee was paid in the original cases, and an additional trial tax fee has been assessed in the two proceedings involving forfeiture of bond. I am of the opinion that the trial tax fee should be charged in each of the original cases, but not in either of the forfeiture proceedings, which are merely branches of the original cases.

The letter of Messrs. Barnett, Bugg & Lee is herewith returned.

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

TAXATION; CORPORATIONS:—A corporation which has bought up a part of its own stock does not thereby decrease its capital stock for the purposes of taxation.

June 5, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You state the following facts:

A corporation, under the laws of Alabama, begins business with a "paid up" capital stock of \$50,000.00. Subsequently this corporation, without increasing its capital stock in the manner provided by section 3480 of the Code of 1907, buys for itself \$10,000.00 of the outstanding paid up capital stock and still holds and owns this stock to the amount of \$10,000.00 as "treasury stock;" the respective interests of the stockholders in the entire capital stock of the corporation and the proportionate ownership of each stockholder in the entire assets of the corporation not otherwise being changed or impaired. I have substituted figures, where you used none, for the purpose of adding clarity to this opinion.

On the above statement of facts, you ask to be advised whether the corporation in question is liable for a franchise tax based on the actual amount of "paid up" capital stock (\$50,000), or whether this tax must now be measured by the amount of stock now in the hands of the stockholders, namely, \$40,000.00.

Section 229 of the Constitution of 1901 provides:

"The Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this State, *which shall be in proportion to the amount of capital stock.*" (Italics mine).

This provision is mandatory.

In compliance with this mandatory provision of our constitution, the Revenue Law of 1919, section 15, requires "every corporation organized under the laws of this State, except," etc., to pay annually to the State "an annual franchise tax of sixty cents on each one thousand dollars of its paid up capital stock."

The constitutional and statutory provisions as to the franchise tax are plain and emphatic. The method open to the corporation for decreasing its capital stock is equally plain and emphatic. The franchise tax is levied in proportion to the "paid up" capital stock of the corporation without reference to the ownership of any particular shares. It is immaterial whether the corporation as an entity owns a part of this "paid up" capital stock, or whether *all* the "paid up" capital stock is owned by the individual shareholders. The tax is not levied with respect to ownership of the stock. Unless and until this "paid up" capital stock ceases to exist, the franchise tax must be paid on it. If a prosperous corporation, earning big dividends, could buy its own stock with these dividends and thus reduce its tax in proportion to its prosperity, our franchise tax would become a farce and delusion.

I am of the opinion, therefore, that this corporation, under the facts above stated, is still liable for a franchise tax on the full amount of its "paid up" capital stock—\$50,000.

Yours truly,

HENRY P. WHITE,
Assistant Attorney General.

CHILD LABOR LAW:—Children working in turpentine orchard are not engaged in agricultural pursuits.

June 5, 1920.

Mrs. L. B. Bush, Director,
Child Welfare Department,
Capitol.

Dear Mrs. Bush:

Replying to your inquiry of May 15th, 1920, I beg to advise that a person engaged in operating a turpentine orchard is not engaged in agricultural pursuits, and that children are not exempt under the agricultural section of the Child Labor Law from being prohibited from working in turpentine orchards.

Very truly yours,

J. Q. SMITH,
Attorney General.

OFFICE HOLDERS; CITY BOARD OF EDUCATION; CITY COMMISSIONERS:—President of city commission cannot be also member of city board of education.

June 15, 1920.

Hon Spright Dowell,
Superintendent of Education,
Montgomery, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter inquiring whether the President of the Commission of the City of Birmingham is by virtue of his office also President of the Board of Education of that city.

Section 7 of what is known as the Five Commissioner Act, approved September 25, 1915, provides as follows:

"Provided, however, that nothing herein contained shall be construed to repeal any law creating a board of education for such cities and prescribing the duties of such board, except that the President of the Commission created by this act shall by virtue of his office be the chairman of such board of education."

(Acts 1915, page 793).

Section 2 of Article 8 of what is known as the School Code, approved September 26, 1919, so far as applicable to this question, provides as follows:

"The general administration and supervision of the public schools and educational interest of each city shall be vested in the city board of education, to be composed of five members, who shall be residents of such city, *and who shall not be members of the city council or commission.*"

(Acts 1919, page 595).

The determination of this question depends on whether or not that part of Section 7 of the Five Commissioner Act, which makes the President of the City Commission ex-officio Chairman of the City Board of Education, was repealed by that part of Section 2 of Article 8 of the School Code which prohibits any member of a City Commission from being a member of the Board of Education.

That construction of a statute is proper which ascertains and gives effect to the intention of the law maker. The intention of the law maker is the law.

Ferguson vs. Commissioners Court of Jackson County, 187 Ala. 645; 65 So. 1028; City of Birmingham vs. Southern Express Company, 164 Ala. 529; 51 Southern 159.

It is impossible to read the Act creating what is known as the School Code without the conviction that it was intended as a complete revision of all previous laws relating to the public school system and to public education in this State.

It was the evident purpose of the law makers that it should be a substitute for all previous provisions relating to the subject of education. This purpose is found declared in the first sentence of the caption of the act, which is "To provide a complete educational system for the State of Alabama"—Acts 1919, page 567.

Furthermore, section 1 of Article 2 provides, "There shall be throughout the State of Alabama a general system of public schools, including such types of instruction and educational institutes and agencies as may be provided for by general law by county or district authority, acting under the general powers conferred upon such by this Act"—Page 569.

Again section 23 of Article 8 enumerates those City Boards which are excepted from the provisions of this Article. The inclusion of these specified exceptions excludes the idea that any other exceptions were to be made.—Page 66.

These and other provisions of the Act evidence the intention of the legislature that the School Code, approved September 26, 1919, should constitute all the law on the subject of public schools and public education. This being true, the School Code repealed all former statutes conflicting therewith.

Edson vs. The State, 134 Ala. 50; 32 So. 308; Scott vs. Simmons, 70 Ala. 352; Lemay vs. Walker, 62 Ala. 39; Prowell vs. The State, 142 Ala. 80; 39 So. 164.

The question is not entirely free from difficulty, and the City Attorney of Birmingham has written a strong opinion reaching the conclusion that the President of the City Commission is a member of the City Board of Education. His conclusion is grounded mainly on two legal principles as follows:

(1) That Section 2 of Article 8 of the School Code is a re-enactment of Section 1349 of the Code of 1907, and did not repeal the intermediate Five Commissioner Act, which qualified Code Section 1349, and

(2) That the Five Commissioner Act is a "special law" and not repealed by the general provisions of the School Code.

Rules of statutory construction are only for the purpose of ascertaining the true intent of the law maker, and if that intent is obvious and clear the reason for the rule ceases, and, therefore, the rule itself should cease—City of Birmingham vs. Southern Express Company *supra*. "If the meaning of the legislature is clear every technical rule of construction must yield."—Endlich Interpretation Statutes, Section 295.

While Section 2 of Article 8 of the School Code is virtually a copy of Section 1349 of the Code of 1907, this is necessarily true of many provisions where the act is intended as a substitute for all previous statutes on the subject. It will be noted, however, that while Code Section 1349 prohibits members of the City Council from serving on the City Board of Education, that section 2 of Article 8 of the School Code extends this prohibition to members of a City Commission. Thus, unmistakably evidencing the fact that the legislative mind was directed to a consideration of such cities as Birmingham which were under a commission form of government. The failure to include the City of Birmingham in the express exemptions from this Article after having their minds directed to its consideration, is positive proof that it was the legislative intention to include the City of Birmingham within the operation of the general provision of the School Code. This being the certain intent of the law maker, the rule of construction that would lead to any other conclusion has no field of operation.

The second legal principle relied on in the opinion of the City Attorney finds support in the following expression in the case of the Board of Revenue vs. Johnson—76 So. 859, to-wit:

“(1) While Senate Bill 744 is in legal theory a general law, it is in fact, so far as its operation is concerned, a special law, since it singles out and withdraws from the influence of the general law a certain class of counties, by a distinction which is applicable at present only to Jefferson county.”

The court in this case had under consideration a statute passed as a general law, by giving it a population classification which made it applicable only to Jefferson County. It is contended that as the Five Commissioner Act was also passed as a general law and given a population classification that made it applicable only to the City of Birmingham, that under this authority it is a special act and not repealed by the general provisions of the School Code.

I am of the opinion that the real turning point of that decision, the conclusion of which was evidently correct for other reasons than the one herein quoted, was not the fact that the Act was a “special law.” The Act was not a special law under that definition of a special law contained in our Constitution. It might have been in effect a local law, and not a special law—Sec. 110, Constitution 1901. If a law is a general law for the purpose of enactment, it is a general law for the purpose of repeal. Any other distinction might be theoretically correct, but of too fine a distinction to be practical. I am unwilling to strike down what I conceive to be the undoubted intention of the law maker on this expression in the case of Board of Revenue vs. Johnson, *supra*.

It is my opinion, therefore, that the President of the Commission of the City of Birmingham is prohibited from serving as a member of the Board of Education of that City.

Very truly yours,

HARWELL G. DAVIS,
Assistant Attorney General.

SCHOOL TAXES; BIRMINGHAM AND FAIRFIELD DISTRICTS:

—Changing boundaries between two incorporated towns does not change the school district. Tax levied before change of boundary goes to school district for which originally levied.

June 18, 1920.

Dr. Spright Dowell,
Superintendent of Education,
State Capitol, City.

Dear Sir:

The correspondence between you and the Superintendent of Jefferson County, transmitted by you to this office, discloses the following facts:

During the year 1917 the County Board of Education constituted the corporate limits of the City of Birmingham, as such corporate limits then existed, a school district. An election was held in this district for a levy of the three mill school tax under Article 19 of the State Constitution. During the session of the Legislature of 1919 a part of the territory included within the corporate limits of the City of Birmingham was excluded from the City of Birmingham, and included within the corporate limits of Fairfield. The question for determination is whether the funds arising from the three mill tax on this area transferred from the City of Birmingham to Fairfield should be paid to the City of Birmingham or to Fairfield.

The corporate limits of the City of Birmingham as such boundaries existed during the year 1917, were constituted by the approval of the County Board of Education a school district for the purpose of levying the three mill tax provided for by Article 19 of the State Constitution. The boundary of this school district remains the same, regardless of the action of the Legislature in changing the corporate limits of the municipalities of Birmingham and Fairfield.

Article 19 State Constitution.

Section 2, Acts 1915, pp. 107 and 350.

It is my opinion, therefore, that the funds derived from the property in question should be paid to the Birmingham school district.

Very truly yours,
J. Q. SMITH,
Attorney General.

ALABAMA POLYTECHNIC INSTITUTE; SERUM PLANT LABORATORY; APPROPRIATIONS:—Appropriation for serum plant laboratory does not cover part of salary of State Veterinarian.

June 19, 1920.

Dr. Spright Dowell,
Superintendent of Education,
State Capitol, City.

Dear Sir:

I beg to advise relative to the following inquiry.

Can the Board of Trustees of the Alabama Polytechnic Institute use the funds of the Serum Plant Laboratory to pay part of the salary of the State Veterinarian?

The professor of veterinary science of the Alabama Polytechnic Institute is State Veterinarian, and as such officer the law provides for him a salary of five hundred dollars per year. Political Code 1907, Secs. 759-767.

The act establishing the Serum Plant Laboratory charges the State Veterinarian with the duty of supervising and directing this laboratory, but does not provide that he shall receive any compensation for such labor. He is encumbered with the duty by virtue of the office he holds. Acts 1915, p. 104.

Persons take office *cum onere* and are required to render service imposed by statute gratuitously, unless the law by express terms of the statute provides compensation for such duties.

Mobile County v. Williams, 180 Ala. 639; 61 So. 963.
Tolbert v. Hale County, 131 Ala. 143; 30 So. 453; Troup v. Morgan County, 109 Ala. 162; 19 So. 503.

The conclusion must follow that the State Veterinarian cannot be compensated for his duties as director and supervisor of the Serum Laboratory because the statute does not so provide.

The funds appropriated by the Legislature to the Serum Laboratory are for equipping and maintaining the plant, and cannot be used for any other purpose. The fund derived from the sale of serum is supposed to be only sufficient to cover the cost of material and labor necessary in procuring or manufacturing the serum, and should be de-

voted solely to such purpose. This latter fund, therefore, could not be used to pay part of the salary of the State Veterinarian. The only labor for which he could be compensated out of this latter fund would be for that labor performed in the production or manufacture of the serum independent of or in addition to his official duties as director and supervisor of the Serum Laboratory.

Very truly yours,
HARWELL G. DAVIS,
Assistant Attorney General.

OFFICE HOLDERS; JUDGE OF INFERIOR COURT IN PRECINCTS 15 AND 20 IN CALHOUN COUNTY is not entitled to receive increased compensation during his term of office.

June 24, 1920.

Hon. Chas. E. McCall,
Chief Examiner Public Accounts,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of June 23, in which you ask to be advised as to whether or not the judge of the Inferior Court of Precincts Fifteen and Twenty in Calhoun County is entitled to receive the increased compensation during his term of office as provided by the Local Acts of the Legislature of 1919, page 169.

I find that the Inferior Court in Precincts Fifteen and Twenty in Calhoun County, Alabama, was established by the Legislature of 1915 (Local Acts, page 93), by an act providing that the judge thereof should hold for a term of six years. Section 4 of said act of 1915 provides that such officer shall be considered a county officer, within the meaning of election and other laws of Alabama, and section 5 provides that the judge of said court shall receive a salary of twelve hundred dollars a year, out of the county treasury, upon his warrant drawn on the county treasury.

It is apparent that the Legislature has designated this office as a county office.

I am of the opinion, from a careful reading of the original act and the amendment thereto, by the Legislature of 1919, that the Judge of the Inferior Court of Precincts Fif-

teen and Twenty, in Calhoun county, Alabama, is not entitled to the increased compensation under the act approved September 23, 1919 (Local Acts 1919, page 169), and in reaching this conclusion I have before me section 68 of the Constitution of 1901, which provides that:

"The Legislature shall have no power to grant or authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee or allowance to any public officer, servant or employee, agent or contractor, after service shall have been rendered or contract made, *nor to increase or decrease the fees and compensation of such officers during their term of office*; nor shall any officer of the State bind the State to the payment of any sum of money but by authority of law; provided that this section shall not apply to allowances made by commissioners' courts or boards of revenue to county officers for ex officio services, nor prevent the Legislature from increasing or decreasing at any time the allowances to sheriffs or other officers for feeding, transferring or guarding prisoners."

It has been held by our Supreme Court that under Section 150 of the Constitution of 1901, the justices of the Supreme Court, chancellors, and the judges of the circuit and other courts of record, except probate courts, may receive an increase in their salaries during their term of office. The court under consideration here is not a court of record, and does not fall within the influence of section 150 of the Constitution.

I am further of the opinion that the incumbent of this office cannot take advantage of the increase as provided under the Acts of 1919 by reason of the prohibition contained in section 271 of the Constitution of 1901, which provides that "The salary, fees or compensation of any officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

Very truly,

J. Q. SMITH,

Attorney General.

OFFICE HOLDERS; INVALID ACT:—Any officer receiving funds under an unconstitutional act is required to refund same.

June 24, 1920.

Hon. Chas. E. McCall,
Chief Examiner,
Capitol.

Dear Sir:

Replying to your inquiry as to whether an officer is required to refund monies collected from the county under an unconstitutional act, I beg to advise as follows:

An act which violates a constitutional provision is absolutely void, and has no legal effect whatever. It cannot serve as a protection against civil liability and no rights can grow out of it. The receipt of an officer of monies from a county under the terms of an act which is unconstitutional is the same as receiving money without any provision of law whatever permitting the same. Any officer receiving funds under an unconstitutional act is required to refund the monies so collected.

Norwood v. Goldsmith, 168 Ala. 224; 53 So. 84; Mobile County v. Williams, Judge, 180 Ala. 639; 61 So. 916; Montgomery vs. Reese, 149 Ala. 188; 43 So. 116.

Very truly yours,
HARWELL G. DAVIS,
Assistant Attorney General.

COUNTY BOARD OF HEALTH; OFFICE HOLDERS:—Employees of county board of health must be appointed by county health officer and unless so appointed are not authorized to receive compensation from the public funds.

June 25, 1920.

Dr. S. W. Welch,
State Health Officer,
Capitol.

Dear Sir:

In answer to your letter inquiring whether it is lawful to pay salaries to persons acting as employees of the County Board of Health, who were employed by such Board

without the consent of or being appointed by the County Health Officer, I beg to advise as follows:

The Public Health Laws provide that "All assistants and employees of the County Board of Health shall be *appointed* by the *County Health Officer*, subject to the approval of the County Board of Health and County Board of Revenue or Board of like character."—Acts 1919, p. 914, section 706, subdivision 1. This provision is too plain to need construction.

The County Board of Health has no power of its own initiative to legally employ any person to discharge any of the duties relative to public health laws. It is only vested with the right of approval of appointments made by the County Health Officer. Until the County Health Officer makes an appointment there is no right on the part of the County Board of Health to take any action whatsoever relative to its employees and assistants.

To constitute a valid employment there must be (1) an appointment by the County Health Officer and (2) an approval of this appointment by the County Board of Health and Board of Revenue.—*People vs. Bissell*, 49 Cal. p. 407.

Persons who have not been employed, as required by law, are not authorized to draw or to receive compensation from the public fund.

Very truly yours,
HARWELL G. DAVIS,
Assistant Attorney General.

CORPORATIONS; TAXATION:—Corporate stock cannot be retired merely by being bought in by the corporation.

June 28, 1920.

Hon. Nathan L. Miller,
Attorney at Law,
American Trust Building, Birmingham, Ala.

Dear Sir:

Your letter of the 23d inst., in reference to our ruling that treasury stock owned by a domestic corporation is subject to the franchise tax, has been referred to me for reply.

I have again carefully considered the question, in connection with your argument and the authorities cited by

you, and I am unable to change my conclusion. In fact, this additional investigation has confirmed me in my original opinion.

You say: "Your fundamental error is in assuming that stock in the treasury is stock in existence." Right here lies the fundamental difference between us. My position is that this stock is still in existence, that "paid up" capital stock, after issuance, can be retired in only one way, the method prescribed by the statute; that, until so retired, it remains "paid up" capital stock, whether owned by the individual stockholders, or by the corporation itself.

The definition of a share of stock quoted by you from 5 Fletcher Cyc. Corp. Sec. 3425 does not, in my opinion, at all affect the above conclusion. In this same volume of Fletcher, sections 3421 and 3594, you will find a recognition of the power of a corporation to hold its own stock in this manner and to sell and dispose of the same. Our Supreme Court in Walsh v. State, 74 Sou. Rep. 49, held that its own stock purchased by a corporation becomes treasury stock. Thus recognizing its continued *existence as stock*.

You construe Hall v. Ala. Term. and Imp. Co., 173 Ala. 414, as prohibiting the ownership by a corporation of its own stock. Such a construction is in conflict with Walsh v. State, supra. But, in my opinion, the Hall case does not support your construction of it. The holding here, as I conceive it, is that the purchase by a corporation of its own capital stock, in an attempt to discharge the liability of its original stockholders on unpaid subscriptions, is a fraud on the creditors of the corporation. If, as you contend, the purchase by a corporation of its own stock is illegal, then this illegality would vitiate the sale and the stock so attempted to be sold would still belong to the original owner. In my opinion, however, in the absence of any fraud on the corporation creditors, the stock purchased by the corporation becomes treasury stock, owned by the corporation, and can be sold and disposed of by the corporation. Its salability as *stock*, recognized by the authorities above cited, conclusively demonstrates its continued *existence as stock*. I can conceive of no reason why a transfer of stock to the corporation itself, any more than a transfer of the same stock to an individual, destroys its character as "paid up capital stock,"

Section 3480 of the Code, which provides the method for increasing or decreasing the capital stock of a corporation, expressly recognizes that some of the out-standing stock may be owned by the corporation itself. This section provides that a decrease of the capital stock "may be effected by retiring or reducing any class of the stock, or by the surrender by every share holder of his shares and the issuance to him in lieu thereof of a decreased number or shares, *or by retiring shares owned by the corporation*, etc. The necessary inference is that until this statute is complied with the shares of stock owned by the corporation are still out-standing. This section of the Code would contain no provision for their retirement if they ceased to exist when purchased by the corporation.

After a careful reconsideration of the question, I am still of the opinion that this treasury stock, owned by the American Bolt Company, is subject to a franchise tax to the same extent as other stock held by the individual stock holders.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

LICENSES; MONEY LENDING:—Money lending is "principal business" when engaged in independently of other business, for profit; whether or not the person or corporation is also engaged in other businesses.

June 28, 1920.

Hon, John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Schedule 70 of section 361 of the Revenue Law of 1919 levies a license tax on "*every person, firm or corporation, whose principal business is lending money.*" You state that numerous persons are refusing to take out this license on the ground that money lending is not their "principal business," although such money lending is not an incident to or an integral or necessary part of any other business in which they are engaged.

You ask whether our Supreme Court has ever passed on this particular provision.

I have traced the history of this license tax back to the Code of 1896, section 4122, subdivision 53. This subdivision contained the provision "whose sole or principal business is the loaning of money" and the license was required only of companies, corporations and associations. The Acts of 1903, page 211, subdivision 56, amended this section of the Code so as to include individuals and omitted the word "sole." This act added the proviso: "who has a fixed place of business for such purpose." Acts 1907, page 466, section 9, again amended this law by levying a straight license on the business of money lending, without any limitation or qualification. The same legislature soon afterwards re-enacted almost verbatim the law of 1903, with the identical provisions as to "principal business" and "fixed place of business." Both of these limitations were carried forward into the revenue laws of 1911 and 1915. The revenue law of 1919 omitted the second limitation—"who has a fixed place of business for such purpose."—but retains the restriction as to "principal business."

The tax officials of the state have always construed the expression "principal business" as meaning merely that the money lending of *itself* must not be an incident to or a necessary integral part of another business in which a person is engaged; that money lending is a "principal business," when engaged in independently of other business, for profit; that such a money lender is not exempt from the license simply because he is also engaged in other business which is greater in volume or value. This construction seems to me to be accordant with law and common sense. A practical construction of a revenue law will not require tax officials to determine the volume and value of the various businesses in which a person may be engaged, in arriving at a conclusion as to whether he is liable for this license or not.

The following authorities, while not deciding the identical point, are persuasive to the conclusion above reached.

Harris v. State, 50 Ala. 127;

Morningstar v. State, 135 Ala. 66;

Mobile v. Richards, 98 Ala. 594.

I concur fully in the construction given by you in your circular letter of January 6, 1920. (L. M. No. 12).

Yours truly,

J. Q. SMITH,
Attorney General.

SOLICITORS' FEES; COUNTY FUNDS:—Code section 7792 repeals local law providing that solicitor's fees in Bibb County shall be paid to the treasurer of the county, to be credited to the general fund of the county.

June 28, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of June 26th, in which you ask to be advised as to whether or not section 7792 of the Code of 1907, which directs that all fees which may be by law taxed as solicitors' fees against defendants on conviction secured by a solicitor who is paid a salary by the State belong to the State and when collected must be paid into the State Treasury, repeal a local act of the Legislature, approved February 22, 1907, which provides that all solicitors' fees arising out of or collected as costs in any and all cases specified in section 1 of this act shall be paid into the Treasury of Bibb County, Alabama, to be credited to the general fund of said county—Local Acts 1907, p. 147.

I am of the opinion, and so advise, that section 7792 of the Code of 1907 repeals the local act regulating solicitors' fees in Bibb County, approved February 22, 1907. The Code was passed some months after this local act, and from a careful reading of the chapter with reference to the duties of solicitors and the disposition of solicitors' fees, it is apparent that this law revises the whole subject of the regulation and collection of solicitors' fees, and thereby repeals the local act on this subject.

Very truly yours,

J. Q. SMITH,
Attorney General.

TAX ADJUSTER; COUNTY COMMISSIONERS:—Court of county commissioners may hear tax appeal cases from and after fourth Monday in July. If tax adjuster wishes to be present at hearings he may either delay all his final decisions so that appeals will be made at nearly the same time, or he may suspend his own hearings in order to be present.

June 28, 1920.

Hon, John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

I am directed by the Attorney General to answer your letter of the 15th instant, in which you ask to be advised as to when appeals from the tax adjuster must be heard and determined by boards of revenue or courts of county commissioners.

Section 104 of the revenue law of 1919 requires all appeals from the rulings of the tax adjuster to be taken within ten days after the date of the final decision of the tax adjuster. This section further provides that "all such appeals shall be set for trial at the first succeeding term of the court after the appeal is taken." Section 107 provides that, for the purpose of hearing these appeals, "the court of county commissioners or other court of like jurisdiction in every county shall hold regular terms on the fourth Monday in July in each and every year and may continue until the cases before it are disposed of, and such adjourned and special term, either or both, as may be necessary, and may continue in session in each case until the business before it is disposed of."

These two sections harmonize with sections 89 and 94 of the revenue law which, while expressing a legislative wish that the tax adjuster complete his hearings on or before the second Monday in July, at the same time provides for the possibility of his work being unfinished on that date. So, in accordance with the general legislative scheme for the completion of this work on or before the second Monday in July, and allowing ten days for appeals from rulings made on this last day, section 107 fixes the fourth Monday in July for the first meeting of the commissioners court to consider these tax appeals. Recognizing that other appeals may be taken from decisions made by the tax

adjuster after the second Monday in July, this same section provides for adjourned and special terms of the commissioners court. The requirement of section 104 that "all such appeals shall be set for trial at the first succeeding term of the court after the appeal is taken" does not conflict with section 107. It is manifestly the purpose of both sections to secure as speedy a determination of the appeals as is consistent with the interests of both the State and the tax payers. The commissioners court, however, have full authority to continue all tax cases from time to time until the tax adjuster completes his work. An arrangement satisfactory to the adjuster and the court can usually be made.

If the tax adjuster anticipates that the court will try these appeals, while he is still hearing objections to other assessments (which it probably has the power to do), he may meet this situation in one of two ways: (1) He may withhold his decisions in all contested assessments until all objections are heard, and then enter a ruling in each case after completion of the hearings, so that all appeals are necessarily taken at the same time; or, (2) if he has commenced his work, and some appeals have already been made from his rulings, he may suspend further hearing of other contested assessments until the appealed cases have been tried and disposed of.

If the second method is pursued, the adjuster must, of course, make proper orders of continuance in each contested case. One obvious objection to the first suggested course is the necessity, as a matter of right or courtesy, of notifying each individual contestant of the final judgment in his case, so that he may appeal if he desires. In pursuing either method, it will probably be necessary for the State Tax Commission to extend the time for hearing objections as provided by section 89 of the revenue law.

In my opinion, it will not be necessary to actually adopt either alternative above suggested. An unfriendly court will come to terms, if it is advised that a precipitate trial of tax appeals will inconvenience the great body of tax payers whose objections are waiting to be heard.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

TAXATION; INTEREST:—Interest runs from due date on unpaid license taxes.

June 30, 1920.

Mr. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You ask to be advised whether franchise and other license taxes bear interest from the date of delinquency.

Under the provisions of section 2173 of the Code of 1907 "all taxes, after becoming delinquent, bear interest at the rate of eight per cent per annum."

The following Alabama decisions hold that interest is recoverable on unpaid license taxes:

Southern Car and Foundry Co. v. State, 133 Ala. 629; Jebeles v. State, 117 Ala. 174.

Yours truly,
J. Q. SMITH,
Attorney General

TAXATION; CORPORATIONS:—Surplus is not taken into account in fixing franchise tax of corporations.

July 6, 1920.

Mr. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You state the case of a domestic corporation with an actual paid up capital stock of \$10,000 and a surplus of \$990,000 and ask whether the franchise tax is levied on the entire million dollars, or is levied only on the \$10,000 paid up capital stock.

Section 229 of our State constitution requires the legislature to "provide for the payment of a franchise tax by corporations organized under the laws of the State, which shall be in proportion to the amount of capital stock."

Section 234 of our constitution prohibits a corporation from increasing its stock or bonded indebtedness except in pursuance of general law, etc."

Chapter 69 of the Code of 1907, which prescribes the mode of creating and organizing corporations, requires the

certificate of incorporation to set forth the amount of the total authorized capital stock, which shall not be less than two thousand dollars; the number of shares into which the same is divided; the amount of capital stock with which it will begin business, which shall not be less than twenty-five per cent of the authorized capital, and in no case less than one thousand dollars.

Section 3480 of the Code of 1907 fixes the method for increasing or decreasing the capital stock of a corporation organized under the laws of Alabama.

I have quoted the above constitutional and statutory provisions as more or less pertinent to a proper construction of section 15 of the Revenue Law of 1919, which exacts from domestic corporations an annual franchise tax of sixty cents on each one thousand dollars of their *paid up capital stock*.

The concrete question, therefore, is whether the words "paid up capital stock," used in section 15 of the present revenue law include *surplus*.

Commercial Fire Ins. Co. v. Board of Revenue, 99 Ala. 1:

Chief Justice Stone, in the opinion in this case, quotes with approval this definition of capital stock given in Cook on Stock and Stockholders, section 3:

"Capital stock is the sum fixed by the corporate charter as the amount paid in, or to be paid in by the stockholders, for the prosecution of the business of the corporation, and for the benefit of corporate creditors. The capital stock is to be clearly distinguished from the amount of property possessed by the corporation.

***** At common law the "capital stock does not vary, but remains fixed, although the actual property of the corporation may fluctuate widely in value, and may be diminished by losses, or increased by gains."

And, in distinguishing between capital stock and the shares of stock owned by the individual stock-holders, Judge Stone says:

"When we speak of capital stock of a corporation we are understood to refer to the sum subscribed in its

organization. When we speak of stock, we mean the certificates issued by the corporation to the shareholders, which certificates, like titles to property, furnish the evidence of ownership of the shares of stock. Capital stock is the aggregate of money or other valuable thing contributed, or paid into the common treasury, as a condition of the exercise of corporate functions, and a security for their faithful and prudent exercise. It is the property of the corporation, charged with a trust, it is true; but nevertheless, in its possession, and under its control. The stock, stocks or shares of stock do not belong to the corporation. They belong to the shareholders, and are exclusively under the control of the several owners."

6 Cyc., p. 348 thus defines capital stock:

"The sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders, for the prosecution of the business of the corporation, and for the benefit of corporate creditors; the nominal capital*****. Capital stock, in its strict signification, exists only nominally and remains fixed, while the capital or actual property of the corporation varies in value, and is constantly increasing or diminishing in amount."

See also to same effect *American Pig Iron & Storage Co. v. State Board of Assessors* (N. J.), 29 Atl. Rep. 160.

The following authorities distinguish "surplus" from "capital stock":

Bank of Commerce v. Tennessee, (U. S.), 40 L. ed. pp. 649 and 659, quoting from opinion of Mr. Justice Peckham:

"The surplus belonging to the bank is 'corporate property,' and is distinct from the capital stock in the hands of the corporation. * * * The very name of surplus implies a difference. There is capital stock and there is a surplus over, above, and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders. No individual

shareholder has any right to claim any portion of this surplus. Until divided by the Board of directors it remains the property of the corporation itself, and in the sense in which the words 'capital stock' are used in the exemption clause the surplus does not form any part thereof. * * * Although a surplus may be required by the national banking act, and also by the laws of good and safe banking, yet we do not perceive that this fact has any material effect upon the question."

Smith v. Dana, 77 Conn. 543, 107 Am. St. Rep. 51:

"Undistributed profits or surplus of a corporation in any form may be invested in the business of the corporation without thereby becoming 'capital stock.' Until such profits are effectually and irrevocably dedicated to corporate uses through the medium of a stock dividend, they do not pass beyond the control of the corporate directors, nor cease to be available for distribution as cash dividends to those originally entitled thereto as such."

See also 7 R. C. L. sec. 261.

The above authorities, and others which might be cited, draw a distinction between "capital" and "capital stock."

Fitzpatrick v. Dispatch Printing Co., 83 Ala. 606 607.

"Capital" includes "capital stock," surplus, undivided profits, and all other property and assets of the corporation. "Capital stock," as above defined, is simply the sum subscribed in the organization of the corporation, together with any additional amount obtained through an increase of the capital stock.

There are still other principles to be considered in arriving at the true meaning of the words "paid up capital stock" as used in our franchise tax law.

1 Cook, Stock, Stockh. & Corp. Law, section 281 lays down this general rule:

"In the absence of express authority from the State, a corporation has no power whatsoever to increase or

reduce the amount of its stock, and any attempt on the part of the corporation, either by the corporate officers or by the stockholders, to do so, is wholly illegal and void."

Granger's Life & Health Ins. Co. v. Kamper, 73 Ala. 325 holds that corporations have no implied power to effect a change in its capital stock, but such change can only be effected by legislative sanction.

See also to same effect Cooke v. Marshall, (Pa.) 43 Atl. Rep. 314.

Our legislature has provided by general law, as required by our constitution, for the organization of corporations in Alabama. It has also prescribed the method for increasing or decreasing the capital stock of corporations. The legislature having provided a particular method for increasing or decreasing capital stock, the corporation is restricted to the precise plan provided. As said by Chief Justice Bricke, in Granger's Life & Health Ins. Co. v. Kamper, 73 Ala. 341, "When a corporation relies upon a grant of power from the legislature to do an act, it is as much restricted to the mode prescribed by the statute for its exercise, as it is to the particular thing allowed to be done."

Knickerbocker Importing Co. v. State Board of Assessors, (N. J.), 65 Atl. Rep. 913, specifically holds that the statutory method for reducing the capital stock of a corporation is exclusive of every other method.

Our legislature, in compliance with the mandatory requirements of our constitution, has provided by general law for the organization of domestic corporations.

Our legislature has also provided a plan for increasing or decreasing the capital stock of such corporations. These statutory methods, under the authorities above cited, are exclusive of all other methods. These statutes and the decisions of our own and other courts distinctly define capital stock as the amount subscribed by the stockholders and represented by stock issued to them, and excluding surplus, undivided profits and other assets of the corporation.

In my opinion, therefore, surplus, as such, cannot be taken into consideration in fixing the franchise tax of a corporation. This holding will doubtless work a discrimination against foreign as well as domestic corporations in

some instances. This result is unavoidable under the peculiar provisions of our constitution, Judge Anderson, in *L. & R. R. Co. v. State*, 78 Sou. Rep. 93, 94, thus disposes of this difficulty:

"There can be no discrimination between domestic and foreign corporations in the general and ordinary operation of our statute. Of course there may be instances where the burden will fall heavier on the one than on the other, in case a foreign and domestic corporation may be both under capitalized, as well as rare cases when the burden may fall heavier upon a domestic corporation which is over capitalized; but in dealing with the vitality of our statutes, and especially when it involves the life of certain sections of our organic law, we must measure them by general conditions rather than by obsolete or exceptional instances."

Yours truly,

HENRY P. WHITE,

Assistant Attorney General.

TAXATION; MERCHANDISE:—In making assessment of merchandise, all capital actually employed in the business must be taken into account.

Mr. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

July 6, 1920.

Dear Sir:

You state a case where a merchant has a \$100,000 stock of merchandise and \$100,000 of good notes and accounts arising from sales of merchandise, and you ask whether these notes and accounts must be considered in arriving at the assessment of the stock of merchandise.

Subdivision d of section 5 of the revenue law of 1919 subjects stocks of goods, wares and merchandise to ad valorem taxation in this manner:

"All stocks of goods, wares and merchandise, the assessment to be on the average amount on hand during the preceding year, but the amount so assessed shall in no case be less than the capital actually employed in the business."

The last clause of this sentence is as much a part of our revenue law as the first clause, and it merely furnishes a rule for ascertaining the average amount of merchandise carried during the preceding year. The tax is not *eo nomine* nor in effect a tax on solvent credits; but, if these notes and accounts represent sales of merchandise, they must be considered in ascertaining how much merchandise has been on hand during the preceding year. The assessment is not against stock of merchandise on hand on any particular day, but is based on the average amount carried during the preceding year. It would be extremely difficult, if not impossible, to ascertain the average amount so carried without taking into account the sales made during this period.

The fact that no deduction of exempt property owned by a corporation is allowed in the assessment of its shares of stock does not work a discrimination against the corporation. The stock of merchandise is assessed against the corporation. The shares of stock are assessed against the stock holders individually.

State v. Lovejoy, 188 Ala. 401. The corporation and the individual in a mercantile business are assessed exactly alike on their stock of merchandise. If the ownership of exempt property enhances the value of the shares of stock, the corporation cannot complain of the increased assessment of these shares.

I am of opinion, therefore, that in making any assessment of merchandise, whether such stock of merchandise is owned by a corporation or an individual, you must take into account all the capital actually employed in the business.

Yours truly,

J. Q. SMITH,
Attorney General.

TAXATION; CORPORATIONS:—No provision is made for refund of franchise taxes paid to State Tax Commission erroneously.

Mr. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

July 7, 1920.

Dear Sir:

You ask to be advised whether there is any provision for the refund of a corporation franchise tax, which the State

Tax Commission erroneously collected from a partnership; the tax collected having been turned into the State treasury and distributed as the law provides.

Sections 375 and 376 of the present law, allowing a refund of license money paid through a mistake or error on the part of the probate judge, are simply re-enactments of sections 2411 and 2412 of the Code of 1907, as amended by Acts Sp. Sess. 1909, pages 165 and 166.

Prior to the revenue law of 1919, the franchise tax, like other license taxes, was paid to the probate judge; and our supreme court in several decisions held that the Code provisions, as amended, applied to a franchise tax as well as other license taxes.

Bigbee Fertilizer Co. v. Smith, 65 Sou. Rep. 37;

Lovelady v. Loveman, Joseph and Loeb, 68 Sou. Rep. 49;

Board of Revenue v. Sou. Bell Tel. Co., 76 Sou. Rep. 858.

If the legislature of 1919 had made no change in the method of collecting this franchise tax, there would exist no doubt that a refund could be made under sections 375 and 376 of the revenue law. But sections 15 to 26, inclusive, of the present revenue law change entirely the machinery for the collection and apportionment of the franchise tax. Under this new law, foreign and domestic corporations are required to make reports to, and the franchise tax is levied, collected and apportioned by the State Tax Commission.

All records of this tax are kept by the State Tax Commission, and the probate judge has no information available to him in his office on which he can base a certificate for a refund. Section 375 allows a refund to "any person who through a *mistake or error of the judge of probate* has paid to the *judge of probate money* that was not due from him for such license."

Section 376 requires the judge of probate, on the application of any such person, to ascertain the amount due such applicant and grant such certificate as will enable the State Auditor and the court of county commissioners to draw proper warrants. These sections in terms refer only to license money paid *to the probate judge*, through some mis-

take or error of the probate judge. Section 376 obviously contemplates that the probate judge has in his office the records sufficient to substantiate the certificate required of him.

It is doubtless true that the legislature in changing the machinery for the levying and collection of the franchise tax did not intend to withdraw the franchise tax payments from the protective provisions of the refund statute. Yet the conclusion that it has unwittingly done so seems incapable. As the law now stands, franchise and some other license taxes are paid to the State Tax Commission, while the great body of license taxes, as formerly, are still payable to the probate judge.

To render sections 375 and 376 applicable to these license taxes which are not now paid to the probate judge, would require an arbitrary amendment of the law by reading into it provisions which are not found there expressly or by intendment or inference. This would not be construction but an unwarranted assumption of legislative powers.

I advise you, therefore, that sections 375 and 376 of our present revenue law do not authorize a refund of franchise taxes erroneously collected from a partnership; nor do I know of any other law under which this refund can be made.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

LICENSES: AUCTIONEERS:—Auctioneer's license may be issued to a corporation employing any number of agents.

July 8, 1920.

Mr. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Your inquiry of the 2nd instant requires an answer to these two questions:

First: Can a corporation legally take out a license as an auctioneer under schedule 2, section 361, of our revenue law?

Second: If it can legally take out such a license, can its agents or employees, without limitation as to number

act as auctioneers under the one license issued to the corporation?

The license part of the revenue law commences as follows:

"Section 361. That every person, firm, company, corporation, or association engaged in any business, vocation, occupation, calling or profession hereinafter enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a license, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this act."

Then follows an enumeration of the various vocations, etc., which are subject to a license tax, including the schedule levying a license tax on auctioneers:

"Schedule 2. Auctioneers.—Auctioneers in any town or city of twenty thousand inhabitants or more, fifty dollars; in towns or cities of eight thousand inhabitants and less than twenty thousand, thirty dollars; in cities or towns of five thousand and less than eight thousand inhabitants, twenty dollars; in cities or towns of more than one thousand and less than five thousand inhabitants, five dollars. The term 'auctioneer' within the meaning of the foregoing provision shall be deemed to apply to any person selling goods, wares, merchandise or live stock, or other things of value, at public outcry except as herein otherwise provided whether a charge is made for same or not. * * * The payment of the license required by this schedule shall authorize the doing of business only in the town, city or county where paid."

Section 379 of the revenue law provides that the word "person" used in this law includes firms, companies, associations and corporations.

Section 367 makes it unlawful for any person, firm or corporation to carry on any business for which a license is required by law, without first having paid for and taken out a license therefor.

Section 369 subjects an agent of a corporation to a criminal prosecution if he acts for a corporation liable to the payment of a license tax, without said license having been paid.

Section 363 authorizes the issuance of a license to a corporation.

There is no express or implied inhibition in schedule 2 to the issuance of an auctioneer's license to a corporation. The other sections of the revenue law above referred to seem to show that as a general rule no distinction as to liability to a license is made between a corporation and an individual. And in every instance where an additional license is required of the individual members of the firm or of the agent of the corporation, the statute expressly exacts the additional license. Schedule 129, levying a license on labor agents, requires a separate license from each assistant, sub-agent, partner, associate, or employe, of any labor agent. Schedule 3, levying a license on accountants, architects, etc., provides that "if such business is conducted as a firm, or as a corporation, in which more than one person above named is engaged, each person so engaged shall pay a license of five dollars." This last quoted provision also applies to the licenses on dentists, doctors, civil engineers, attorneys, oculists and osteopaths.

The fact that the legislature made express exceptions to the general rule in the instances above noted, and made no such exception as to the auctioneer's license, compels the inference that this particular license is governed by the general rule.

I conclude, therefore, first, that a license is properly issuable to a corporation as an auctioneer, and, second, that such license authorizes it to engage in this business through any number of agents; subject, however, to all the restrictions and requirements as to the place where the business must be carried on. That is to say, the corporation can operate in only *one* city under *one* license.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

SCHOOL SYSTEM; COUNTY EXPENSE:—Expense of taking school census is not chargeable to school funds but must be paid by county or municipality.

July 9, 1920.

Dr. John W. Abercrombie,
State Superintendent of Education,
Montgomery, Ala.

Dear Sir:

Your letter requesting to be advised whether the expense of taking a school census is paid out of the school funds or is a charge against the county, has been referred to me for reply.

An examination of Section 16 of Article 5 (Acts 1919, page 586) and Section 7 of Article 8 (Acts 1919, page 596) of the present School Code, both of which sections relate to the payment of the expenses of taking school census, shows that the intention of the legislature was to relieve the school funds from the burden of such payments, and to require this expense to be borne by the county or city.

It is my opinion, therefore, that the expense of taking the school census must be paid by the county when taken of the county and by the municipality when taken of a city.

Very truly yours,
J. Q. SMITH,
Attorney General.

ROAD BONDS:—Bonds must first be converted into cash before being applied in payment for road construction.

July 9, 1920.

Hon. W. S. Keller,
State Highway Engineer,
Bell Building, Montgomery, Alabama.

Dear Sir:

In reply to your letter of the 25th ult., asking whether it is permissible to pay for road construction directly with bonds authorized by article 20 of the Constitution without first having converted the bonds into cash, I beg to advise as follows:

The provisions of this section of the State Constitution requiring that such bonds be sold "for not less than par,"

that the proceeds derived therefrom "be deposited in the State treasury and kept in a separate fund," and other requirements of this section clearly indicate that it was not contemplated that such bonds should be exchanged for anything except money, and that the people never intended the authorization of a procedure by the adoption of this amendment which would permit the issuance of the bond directly for the payment of material and labor.

It is my opinion, therefore, that the bonds must first be converted into cash for par and deposited in the state treasury as required by the Constitution.

Very truly yours,
HARWELL G. DAVIS,
Assistant Attorney General.

ELECTIONS; SCHOOL TAXES:—Election is not invalid because of fact that probate judge instead of sheriff signed notice of election.

July 9, 1920.

Dr. John W. Abercrombie,
Superintendent of Education,
Montgomery, Ala.

Dear Sir:

You enclose the letter of the Superintendent of Education of Walker County, which states the following facts:

Several School Districts held an election since the approval of the School Code for the purpose of levying the three-mill school tax. The notice of such election was signed by the Probate Judge instead of the sheriff. He wishes to be advised as to the validity of these elections. We shall assume that these elections and notices were in all things regular except that the published notice was signed by the Probate Judge instead of being signed by the sheriff.

Article 12, sec. 1 of the School Code (Acts 1919, p. 607) provides as follows:

"The sheriff must give notice at least thirty (30) days before any election to be held under this Act, by publication in some newspaper in the county, if any is published therein, and if not, by writing posted at the courthouse door, and at three other public places

in the county of the time of holding, and when any election is to be held for a special tax for school purposes in any rural or city school district, written notices shall be posted in three public places within said district thirty (30) days prior to said election."

While the statutory provision regulating giving notice of an election should be strictly followed, every technical failure to comply therewith will not invalidate the election. The purpose of such notice is to warn the electors that such an election is to be held, and if this purpose is accomplished, and the failure to comply with the statutory requirement as to giving the notice did not deprive such a portion of the electors of their right to vote as would change or make doubtful the result, then the irregularity in giving the notice would not invalidate the election. It has been held by the Pennsylvania courts that the mere fact that the election notice was signed by an officer other than the one required by law, did not invalidate the election.

15 Cyc. 323, D.

Battis v. Price, 2 Pearson (Pa.) 456;

Hearn v. Court of County Commissioners of Blount Co., 182 Ala. 392, 62 South, 533.

Commissioners Court of Washington Co. v. State, ex rel Bowling, et al, 151 Ala. 561, 44 South 465;

Wilson v. Pike County, 144 Ala. 397;

9 R. C. L., Sec. 15.

It is my opinion, therefore, that if there was a substantial compliance with the statute relative to giving notice of the election, and a fair election was held thereunder (unless it appeared that a sufficient number of electors to make doubtful the result were deprived of their right to vote) the election would not be invalidated by the mere fact that the Probate Judge instead of the Sheriff signed the notice.

Yours very truly,

HARWELL G. DAVIS,
Assistant Attorney General.

DEPARTMENT OF AGRICULTURE AND INDUSTRIES; FERTILIZERS:—Selling fertilizers without complying with the provisions of the act of 1907 would constitute a misdemeanor.

July 10, 1920.

Mr. I. T. Quinn, Supervisor,
Division of Fertilizers,
Department of Agriculture,
Capitol.

Dear Sir:

Section 16 of an Act approved August 14, 1907, provides that any one selling any fertilizer without having complied with any of the provisions of the act are guilty of a misdemeanor. This would serve to constitute a violation of Section 6 of that Act—a misdemeanor.

If the fertilizer was improperly branded the person selling the same would be guilty of a misdemeanor under Section 5, and if the fertilizer contained less than 14 per cent plant food, as required by Section 6, the sale thereof would also be a misdemeanor by virtue of the provisions of Section 16 of the Act.

Very truly yours,
J. Q. SMITH,
Attorney General.

STATE BOARD OF HEALTH; APPROPRIATIONS:—Appropriation for control of venereal diseases was valid.

July 14, 1920.

Hon. R. L. Bradley,
Treasurer of the State of Alabama,
Capitol.

Dear Sir:

The appropriation to the Health Department of the State of Alabama by virtue of the provisions of an Act approved September 29, 1919, (Acts 1919, p. 944), may be devoted by the State Board of Health to the execution of the health laws of the State as, in its discretion, is deemed best. The resolution adopted by the State Board of Health appropriating \$12,700.97 to be used in the prevention, control and treatment of venereal disease was a legal appropriation by the Board of that fund.

You are, therefore, advised that the State Board of Health had full authority to devote this sum to such purposes and that the appropriation by the Board is valid.

Very truly yours,

J. Q. SMITH,
Attorney General.

LICENSES; TALKING MACHINES:—Schedule 4 of revenue law of 1919 does not repeal entirely schedule 4 of 1915 law.

July 15, 1920.

Hon. Watkins M. Vaughan,
Probate Judge, Dallas County.
Selma, Ala.

Dear Sir:

This office answers your inquiry as to the license on dealers in talking machines in counties having a population of less than 60,000.

This office ruled some months ago that schedule 4, section 1, of License Law of 1915 (Acts 1915, p. 491) was still in effect as to all counties having a population of 60,000 and less; and that the revenue law of 1919, schedule 4, section 361, changed the former law only as it applied to counties of more than 60,000 population. Thus construed there is no conflict between the two laws and the latter law does not in effect repeal entirely the former law. If we construe schedule 4 of the law of 1919 as repealing in entirety schedule 4 of the law of 1915, there would be no license at all now on dealers in adding machines, cash registers, typewriters and dictaphones. This result certainly was not intended in the enactment of the revenue law of 1919. There is a field for the operation of both laws. The revenue law of 1919 only purports to repeal all laws and parts of laws in conflict therewith. As above stated, there is no conflict between the two laws.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

TAX COLLECTOR AND ASSESSOR; SCHOOL TAXES:—Allowances made by court of county commissioners to tax collector and assessor for collection of special school taxes remain in force until changed unless limited as to time.

Hon. John W. Abercrombie, July 15, 1920.
State Superintendent of Education,
Capitol.

Dear Sir:

You handed me today letter of Hon. Thos. D. Brooks, county superintendent of education, Marion county, to you, dated July 13th, on which you ask for an opinion. This letter reads as follows:

“Is it necessary for the County Commissioners each year to pass on the question whether or not the tax men be given commissions on the special school tax? If this is to be acted on each year, at what meeting of the Commissioners Court is this to be done?”

The statute covering this matter (Acts 1919, p. 342, portion of section 197) reads as follows:

The tax assessors and tax collectors shall receive such commissions as may be allowed by the commissioners court, boards of revenue or other governing bodies of the several counties of the State, to be not less than one-half of one per cent, and not more than one per cent each as fees on all school funds assessed and collected by them, to be paid out of such special taxes. The collector may retain his commissions upon collections when he makes payment into the State treasury.”

In the case of State ex rel Smith et al v. Justice, 76 South. 426, the following language is found:

“It has been held that whenever the people, in convention or through legislation, clothe any department of the government, or any of its boards or officers or municipalities, with powers at discretion to create an office, they also (in the absence of a declaration of purpose to the contrary) invest such official or body with like power to abolish the office.”

Under the rule laid down in the Justice case no provision appearing in the Act of 1919 to the contrary, I am of the

opinion that it is discretionary with the court of county commissioners as to what allowance shall be made to the tax collector so long as it is not less than one-half of one per cent and not more than one per cent.

When a resolution is adopted by the court of county commissioners fixing the compensation between these limits unless limited as to time, it continues the rule until rescinded. For example if a resolution should be adopted providing that the compensation of the tax collector for this work should be three-fourths of one per cent for a certain tax year, that resolution would only hold good for the period of that year, but if there be no limit as to time, the resolution would continue to rule until rescinded by the board which adopted it or by a succeeding board; and if the resolution should be limited as to time, say for one year, even that could be rescinded and changed so as to provide for a different rate of compensation so long as no right has accrued to the tax collector under the resolution. Of course if the compensation should be fixed at a certain figure and service should be rendered by the tax collector under that resolution, the county would then have no right to change the rate of compensation as to services which had already been rendered under the rate as fixed.

From what is said above it will be observed that the matter lies in the discretion of the court of county commissioners and depends entirely upon the language of the resolution adopted by the board.

Very truly yours,

J. Q. SMITH,
Attorney General.

INSURANCE; FOREIGN MUTUAL INSURANCE COMPANIES:—

The Mutual Insurance Law of 1919 does not conflict with the provision in the revenue act requiring a deposit of \$500 to secure payment of taxes.

Hon. A. W. Briscoe,
Commissioner of Insurance,
Capitol.

July 15, 1920.

Dear Sir:

You request to be advised:

(1) Whether the Act approved September 25, 1919, known as The Mutual Law (Acts 1919, page 678) repeals

that provision of the Act approved February 22, 1915 (Acts 1915, page 132) which provides that foreign mutual insurance companies before being permitted to do business within this State, should make deposits with certain officers of securites to better protect their policy holders, and

(2) Whether mutual insurance companies are exempt from depositing with the Commissioner of Insurance the sum of five hundred (\$500) dollars as required by section 59 of the present Revenue Act (Acts 1919, page 413.)

(1) That part of the Act of 1915, pertinent to the present consideration is as follows:

"That before any foreign insurance company of the kind described in section 1 of the act approved August 19th, 1909 * * * * shall be authorized to do business in this State such company must * * * satisfy the insurance commissioner * * * that it has on deposit with the treasurer of the State or government, or with the proper officer of some other State, securities to the actual cash value of one hundred thousand dollars, consisting of State bonds, United States bonds, municipal bonds," etc.

The title to the mutual law is as follows:

"An Act to provide for the organization or admission and the regulation and taxation of incorporated mutual insurance companies, other than life."

It will be noted that this title specifically limits the subject of the Act to "incorporated mutual insurance companies other than life," which absolutely excludes any company which is *not incorporated* and which is not a company engaged in *insuring life*.

Section 14 of this Act, which it is insisted exempts mutual insurance companies from the preceding quoted provision of the 1915 Act, provides as follows:

"Section 14. That any mutual insurance company organized outside of this State and authorized to transact the business of insurance on the mutual plan in any State, district or territory, may be admitted and licensed to transact the kinds of insurance authorized by its charter or articles of association to the extent

and with the powers and privileges specified in this Act when it shall be solvent under this Act, and shall have complied with the following requirements: (a) Filed with the Insurance Commissioner a certified copy of its charter or articles of association; (b) Filed with the Insurance Commissioner a copy of its by-laws certified to by its secretary; (c) Appointed the Insurance Commissioner its agent of the service of process in any action, suit or proceeding in any court of this State, which authority shall continue as long as any liability shall remain outstanding in this State; (d) Filed a financial statement under oath, in such form as the Insurance Commissioner may require, and have complied with other provisions of law applicable to the filing of papers and furnishing information by stock companies on application for authority to transact the same kind of insurance. Such financial statement must show that the company seeking to be licensed in this State has assets in cash, mortgages or other securities approved by the insurance commissioner, not less in amount than one hundred thousand dollars, and that its surplus over and above all liabilities is not less in amount than fifty thousand dollars; (e) If organized without the United States, make and maintain the deposit required of stock insurance companies formed without the United States transacting the same kind of insurance.

“Upon compliance by any such foreign company with the provisions in this section, such company may be licensed and authorized to transact business in this State, subject to all the provisions of law relating to information to and examinations by the Insurance Commissioner, annual reports, taxes and the renewal of licenses applicable to stock insurance companies transacting the same kind of insurance, except as otherwise provided in this act.”

This section is not limited, as is the title of the Act, to *incorporated companies*, but applies to all mutual insurance companies or associations which are ‘authorized to transact the business of insurance on the mutual plan in any State, district or territory’ whether incorporated or not.

Furthermore, this section also covers mutual insurance companies which are permitted by its charter or articles of association to transact a life insurance business, and is not limited, as is the title of the Act, to companies "other than life."

Section 45 of the Constitution of Alabama of 1901 requires that the subject of an Act be clearly expressed in its title. Our courts have uniformly held that where a provision of an act is broader than the title of the Act that such provision is violative of said Section 45 of the Constitution, and, therefore, void.

It is my opinion that section 14 of the Mutual Law is invalid and in no way affects the prior statute approved February 22, 1915, heretofore set out.

Evans v. Memphis Charleston Railroad Company,
56 Ala. 246;

Miller v. Jones, 80 Ala. 89;

Lovejoy v. City of Montgomery, 180 Ala. 473; 61 So.
579.

Furthermore, it will be noted that said section 14 of the Mutual Law seeks to permit such companies to do business in this State upon a compliance with the provisions of that section, and to the exclusion of any other requirements, which the law may make a prerequisite to doing business in this State.

This section ignores and is in conflict with the requirements of section 232 of the Constitution of 1901 of this State, which prevents any foreign corporation from doing business in this State without having filed with the Secretary of State a certified copy of its articles of incorporation or association.

(2) In my opinion there is nothing in the Mutual Law in conflict with that provision of Schedule 59 of the Revenue Act (Acts 1919, page 413) which requires a deposit of the sum of five hundred (\$500) dollars to assure the payment of the taxes which will be due at the end of the fiscal year.

Very truly yours,
HARWELL G. DAVIS,
Assistant Attorney General.

MILITARY DEPARTMENT:—The Adjutant General with the approval of the Governor may obtain such clerical assistance as may be necessary for the proper conduct of his department.

July 15, 1920.

Col. Hartley A. Moon,
Adjutant-General,
Capitol.

Dear Sir:

Section 10 of the Military Act, Acts 1919, page 467, provides that clerical assistance may be furnished the Military Department in the same manner as it is furnished to the other State Departments.

Section 562 of the Code of 1907 authorizes the Governor to furnish clerical assistance to the different State Departments as he deems necessary when there has been a compliance with the provisions of that section.

Under the provisions of these sections the Governor would be authorized to permit the employment of clerical help for such time and at such salary as he deemed necessary for the public good.

Very truly yours,
J. Q. SMITH,
Attorney General

TAX ADJUSTER; COUNTY COMMISSIONERS:—While literal construction of revenue law of 1919 provides for appeal only in case of dereliction of tax adjuster, yet the whole spirit of the law contemplates such appeal, and method of appeal is set out.

July 21, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Your request for a construction of section 99 of the revenue law, allowing appeals to tax payers from the rulings of tax adjusters, has been received.

For a better understanding of the precise question before us, I quote this section in full.

“Section 99. That in cases where objection has been made by any tax payer, his agent or attorney, to the

valuation fixed by the county tax adjuster or board of tax adjusters, on any property assessed against such tax payer, and such *valuation* is over-ruled by said county tax adjuster or board, such tax payer, his agent or attorney, may take an appeal from the action of the county tax adjuster or board of tax adjusters in overruling his *objection* to such valuation to the court of county commissioners or board of revenue of such county, *unless* the tax adjuster shall have noted on the assessment list a revised valuation made by him, assented to by the tax payer after the tax payer has made objection to the original valuation, or unless the tax adjuster has noted on the assessment list that the tax payer's objection is overruled, such tax payer may appeal from the *original* valuation made by the tax adjuster."

Before proceeding with the argument, it is obvious from the context that the expression "and such valuation is over-ruled" is a mere clerical misprision and that the word "objection" should be substituted for "valuation."

It is suggested that the last clause of the above quoted section, commencing with "unless," so limits and qualifies the general language in the first part of this section as to actually restrict the tax payer's right of appeal to two cases only, namely: first, where the tax payer and the tax adjuster have reached an agreement as to the valuation of the property assessed, but the tax adjuster has failed to enter said agreement on the assessment list; and, second, where, after a hearing before the tax adjuster, the tax payer's objection is overruled, but the tax adjuster fails to note on the assessment list that the objection *is* overruled. It will be noted that, under this construction, the right of appeal is in each instance dependent on the dereliction of the tax adjuster. Adopting this narrow construction of the law, it is then argued inferendo that, if the tax payer's objection *is* overruled and the tax adjuster *notes* the overruling on the assessment list, then the tax payer has *no right* to appeal. The construction suggested puts the objecting tax payer absolutely at the mercy of the tax adjuster. This official on the hearing of a tax payer's objection may double or quadruple the original valuation placed

on the property, and then, by the simple expedient of entering an order on the assessment list, deny an appeal to the tax payer even from these increased valuations. Or, the tax adjuster may favor another objecting tax payer, and, by his mere omission to make an entry on the assessment list, allow this particular tax payer to appeal. In short, an appeal is not a statutory right, but is a mere matter of grace to the tax payer, to be given or withheld at the will of the tax adjuster. And thus our revenue law, designed to effect equalization and assure fair treatment to all tax payers, can be made the vehicle for the most unjust and discriminatory practices. We would be loth to adopt a construction which would lead to such consequences even where the statute itself seemed to require it. For there is a grave doubt as to whether such a law, so construed, is constitutional.

But it is not our province to legislate. We must construe the law as it is written and let the blame for the consequences lie where it belongs.

We are clearly convinced, for reasons to be given, that the legislature intended to allow an appeal to *all* objecting tax payers from the rulings of the tax adjuster. We are equally well convinced that the latter clause of section 99 is not a *limitation* on the right of appeal, but is an *additional guarantee* of an appeal in the instances named.

In arriving at the intent of the legislature, the revenue law must be considered and construed as a whole and, if possible, each section of the law must be given an interpretation consistent with other sections of the law.

Sections 75 to 108 inclusive, of the revenue law, furnish a complete statutory scheme for the valuation of property by the tax adjuster, for the hearing of objections of tax payers to such valuations, for appeals from the rulings of the tax adjuster to the commissioner's court, and for further appeals to the circuit court and to the court of appeals or supreme court. Section 90 provides that when the tax adjuster has completed the work of hearing objections against valuations fixed on the taxable property, he shall enter upon the tax return lists his *corrected valuations*, if any changes have been made, which changed valuations shall be the taxable value of the property, "*unless an appeal is taken.*" Section 92 gives the tax adjuster exclu-

sive right to fix the taxable value of all property in his county, "subject only to the right of appeal." Section 97 requires the tax adjuster either alone or with counsel to represent the state and county in all cases pending before the county commissioners. It is well to note in passing that no cases can be pending except on appeal. Section 100 gives the oath to be taken by each member of the commissioners' court before entering upon his duties for *hearing appeals* in tax cases. Sections 101 and 102 prescribe the procedure for trial of these tax appeals. Section 103 provides that the valuation fixed by the commissioners' court shall be the assessment value of the property passed on "*unless appeal is taken therefrom to the circuit court of the county.*" Section 104 requires all appeals from the rulings of the tax adjuster to be taken within ten days after the date of the final decision of the tax adjuster to the commissioners' court. This same section allows either party to appeal from the judgment of the commissioners' court to the circuit court. Section 107 fixes the term of the commissioners' court for hearing appeals from the final valuations of the tax adjuster. Section 108 provides for appeals from the commissioners' court to the circuit court and from the circuit court to the court of appeals or supreme court. Thus each step in the several appeals is set out with meticulous care and precision. The right of appeal being stated and restated with such particularity as to force the conclusion that the legislature was determined to *emphasize* this right. Is it reasonable, then, to assume that the legislature has erected this elaborate machinery for tax appeals and at the same time denied tax payers the right to avail themselves of it, except at the option of the tax adjuster? In short, is the right of appeal a right belonging to the *tax payer*; or a right dependent on the action of the *tax adjuster*? To ask the question is to answer it. The legislature intended in the numerous sections cited to guarantee to the *tax payer* an appeal from all adverse rulings even up to the court of last resort in the state. This intention is too plainly expressed to be set aside by a narrow, technical construction of one single clause in the revenue law. Our Supreme Court has held that, even where no right of appeal is given by a revenue law, the right exists by implication from other provisions of law regulating the

hearing of tax appeals. *Ex Parte Howard-Harrison Iron Co.*, 24 Sou. Rep. 516.

I must conclude, therefore, that the many provisions in our revenue law for hearing tax appeals in themselves impliedly authorize appeals to be taken by tax payers.

Section 99 as a whole and the latter clause of this section are confirmatory of the conclusion reached by me. The first part of this section in plain language authorizes all objecting tax payers to appeal from the action of the tax adjuster in overruling their objections. The last clause of this section provides that (1) where an agreement has been made with an objecting tax payer and the tax adjuster fails to note the agreement, or (2) where the tax adjuster fails to note that the tax payer's objection is overruled, such tax payer *may appeal* from the *original valuation* made by the tax adjuster. To say that a tax payer, in the two instances cited, may appeal from the original valuation is far from saying that no appeal at all can be taken except in these two cases. This clause is a guarantee of an appeal in these particular instances and does not by inference *deny* an appeal in all other cases. The correctness of this construction becomes apparent when we consider the duties of the tax adjuster. The tax adjuster in the first instance, before the tax payer has any opportunity to object, enters his *original valuation* of the property assessed. Unless a tax payer objects, this *original valuation* become the final *assessed valuation* of the property. But, when a tax payer objects to the original valuation, and his objections are heard by the tax adjuster, as required by the statute, it is then the duty of the tax adjuster to enter an order fixing the value of the property at sixty per cent of its reasonable cash value. This value, under the evidence, may be ascertained, to be the same in amount as the original valuation, or it may be more or less. Whatever valuation is arrived at on the hearing, it is a *new valuation*, reached as a result of the hearing, and it is not in fact, or in legal effect, the *original valuation*. The legislature, however, intending that no tax payer should suffer through the negligence of a tax adjuster, specifically provides that if the tax adjuster fails to note an *agreed valuation*, or if he fails to record the *new valuation*, the objecting tax payer can nevertheless still appeal from the

original valuation. Through the fault of the tax adjuster no valuation appears on the list except the *original valuation*; and, to protect the objecting tax payer in the two instances noted, his appeal is presumed to be from the *original valuation*. In all other cases, the objecting tax payer appeals from the *final valuation* made by the tax adjuster.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

TAXATION; EXEMPTIONS; ELEEMOSYNARY INSTITUTIONS:

—Hospitals are exempt from taxation when any income received is devoted entirely for furthering the charitable object of the institution, or for other charitable purposes.

July 23, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Your inquiry as to what class of hospitals are exempt from ad valorem taxation has been received.

Your inquiry is directed specifically to these two kinds of hospital:

1st. A hospital which receives both pay and non-pay patients—The money received from pay patients being used entirely to defray the expenses of operating the hospital—salaries of nurses and physicians, food and drugs for patients and employes of the institution, etc.—and without any private gain or profit.

2nd. A hospital operated exactly as the one above described, except that it receives more revenue than is needed to cover the expense of operation and these surplus earnings are used entirely for *other charitable purposes*. None of the excess earnings go as gain or profit to the proprietor.

The general principles governing exemptions of eleemosynary institutions from taxation are fully set out in an opinion given you by Assistant Attorney General Harwell G. Davis on January 9th, 1920. As my answer to your inquiry will be merely an abbreviated resume of his ruling, I respectfully refer you to his opinion for a more detailed discussion of the legal principles involved.

The statutory exemption is in this language:

"Section 2. The following persons and property shall be exempt from ad valorem taxation: (a) All property, real or personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, that property, real or personal, owned by any educational, religious or charitable institution, society or corporation, let for rent or for hire or use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious or charitable purposes."

If any part of this statutory provision is in conflict with section 91 of our constitution, the statute must to that extent yield to the higher law. This section prohibits the legislature from taxing lots of a prescribed area, with the buildings thereon, when the same are *used exclusively for purposes purely charitable*. This constitutional exemption is absolute and self-executing and cannot be limited by legislative action.

Anniston City Land Co. v. State, 160 Ala. 253.

It is the *use* of the real property, and not the ownership of it, which determines the right to the exemption; and it is beyond legislative competency to add *ownership* as a prerequisite to exemption from taxation. While the legislature has no power to contract or restrict the guaranteed exemption of real property, it is under no such constitutional limitation in fixing the exemption of personal property. As to personal property exemptions, therefore, the statute alone governs.

The first above described hospital is, I think, clearly exempt from ad valorem taxation. Indigent patients are received and treated free of charge. And, while pay is received from patients able to pay, the money thus received is used entirely in paying the operating expenses of the hospital, and none of it goes as profit or gain to any one. The salaries of physicians, nurses, or other attendants, are items of expense and are not in any sense of the word "profit."

The Court uses this language in *State v. Powers*, 10 Mo. App. 263:

"If they devote themselves partly to the care of paying patients, to defray the expenses of attendance upon the poorer patients who cannot pay, this is surely an act of charity. Or is it to be contended that no charitable institution, not endowed, and independent, is to be exempted from taxation under the law? The fact that paying patients are taken, the profits derived from attendance upon these patients being exclusively devoted to the maintenance of the charity, seems rather to enhance the usefulness of the institution to the poor. The fact of receiving money from some of the patients does not, we think, at all impair the character of the charity, so long as the money thus received is devoted altogether to the charitable object which the institution is intended to further."

And in *St. Josephs' Hospital Assoc. v. Ashland County*, 96 Wis. 636, the Court says:

"It is the very fact that pay is collected from those who can pay which enables the sisters to operate the hospital and care for those who are too poor to pay."

See also *Dayton v. Speers Hospital*, (Ky.) Ann. Cas. 1917 B, page 275 and other cases cited by Mr. Davis in his opinion.

The second above described hospital is exactly like the first, except that its earnings are in excess of the operating expenses and this surplus is devoted to *other charitable purposes*. This circumstance, which really enhances the value of the hospital as a charitable institution, cannot, in my opinion, operate as a revocation of an exemption to which it is otherwise entitled.

I am assuming, of course, that *all* the property of both hospitals is *used exclusively* for general hospital purposes and not for *business* purposes. If, therefore, there are no other circumstances in either case which might defeat the exemption, I am of the opinion that both hospitals described by you are exempt from ad valorem taxation.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

ROADS; STATE HIGHWAY COMMISSION:—Road construction may be performed by day labor or convict labor without letting a contract.

July 23, 1920.

Hon. W. S. Keller,
State Highway Engineer,
Montgomery, Alabama.

Dear Sir:

Replying to your inquiry of July 20th, 1920, I beg to advise that the State Highway Commission is authorized to construct highways by having the work performed in whole or in part by day labor or convict labor as the Commission may deem best for the interest of the State and county. The Commission would have authority to build highways by using the road building outfit of the county, as it would any other day labor.

The Commission has the option of either letting this work by contract or by doing the work by day labor or convict labor. In the event a contract is made, the estimated cost of which exceeds five thousand dollars, then the Commission would be compelled to advertise for bids. The Commission, however, is not required to let the work by contract or to advertise for bids, if it deems it to the best interest of the State that the work to be done by day labor.

Acts 1919, page 895, Section 12.

Very truly yours,
HARWELL G. DAVIS,
Assistant Attorney General.

TAX ASSESSOR; FEES FOR SERVING CITATION:—Tax adjuster's notice may be given by mail or by personal service by the tax assessor, and in case of personal service the fee is taxed and collected from the tax payer if the case is sustained.

July 26, 1920.

Messrs. Bouldin & Wimberly,
Attorneys at Law,
Scottsboro, Ala.

Dear Sir:

You ask to be advised as to the fees allowed the tax assessor for serving citations issued by the tax adjuster.

You will note that section 86 of the revenue law provides two methods for notifying the tax payer, i. e.; by mail, postage prepaid, or by personal service. In the first case, the expense of postage incurred by the tax assessor is paid in equal proportion by the State and county. This expense is paid, regardless of the result in any particular case. If the tax assessor chooses to deliver these notices in *person* as allowed by section 39 of the revenue law, he has the advantage of the extra pay provided for this service, but he assumes the risk of the case against the tax payer being sustained. If the case is sustained, the twenty-five cents fee is taxed as a part of the costs against the tax payer and collected with the taxes. If not sustained, the tax assessor gets no pay for his services.

It is apparently entirely optional with the tax assessor what particular method of giving notice he will pursue.

Yours truly,

J. Q. SMITH,
Attorney General.

STATE TRAINING SCHOOL FOR GIRLS; STATE INSTITUTIONS:—Under the act of 1915 authority was given for sale of the then existing property of the Training School, but the act did not also authorize the sale of property later acquired.

July 29, 1920.

Hon. C. B. Rogers, Chairman,
State Board of Economy and Control,
Capitol.

Dear Sir:

Referring to your letter of the 28th inst., making inquiry if any legal authority exists for disposing of the property of the State Training School for Girls near Birmingham, you will note from section 8, Acts 1915, page 897; that authority is given for the sale or exchange of the then existing property of this school.

It is my understanding that the school property as it stood on September 25, 1915, when the act referred to was passed, has already been sold, and the present site for the school purchased.

The authority contained in the Act of 1915, for the sale or exchange of the property limits the right to effect such sale or exchange to the then existing property, and if my understanding be correct, that a sale has already been made under the authority of that act and a new site purchased, there is no legal authority for disposal of the present property.

Yours very truly,
J. Q. SMITH,
Attorney General.

TAXATION; CORPORATIONS:—Franchise tax is paid on capital stock outstanding, whether paid up or not.

July 30, 1920.

Mr. J. T. Stokely,
Attorney at Law,
Birmingham, Ala.

Dear Sir:

You ask to be furnished the authorities sustaining my opinion that the "paid up capital stock" of the Birmingham Terminal Company, for the purpose of arriving at the amount of the franchise tax due by this company, is the amount of the capital stock *actually issued*, although only \$3,000 of this *issued* stock has been *paid for*. My opinion, above referred to, was merely an informal, oral opinion, but it was given advisedly and after due deliberation. This letter, therefore, will be the first formal statement of the reasons on which my conclusion was based.

Section 229 of our constitution provides:

"The legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject, nevertheless, to repeal at the will of the legislature; and shall pass general laws under which charters may be altered or amended. *The legislature shall by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this State, which shall be in proportion to the amount of capital stock.*"

Section 234 of our constitution provides:

"No corporation shall issue stocks or bonds except for money, labor done, or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased except in pursuance of general laws, nor without the consent of the persons holding the larger amount in value of stock, first obtained at a meeting to be held after thirty days' notice, given in pursuance of law."

Chapter 69 of the Code of 1907, which prescribes the mode of creating and organizing corporations, requires the certificate of incorporation, to set forth the amount of the total authorized capital stock, which shall not be less than two thousand dollars; the number of shares into which the same is divided; the amount of capital stock with which it will begin business, which shall not be less than twenty-five per cent of the *authorized capital stock*, and in no case less than one thousand dollars. The certificate must also set forth the names and post office addresses of the incorporators, and the number of shares subscribed for by each; *"and the aggregate of such subscription shall be the capital stock with which the company may commence business."*

Section 3480 of the Code of 1907 fixes the method for increasing or decreasing the capital stock of a corporation organized under the laws of Alabama.

I have quoted the above constitutional and statutory provisions as more or less pertinent to a proper construction of section 15 of the Revenue Law of 1919, which exacts from domestic corporations an annual franchise tax of sixty cents on each one thousand dollars of their *paid up capital stock*.

The concrete question, therefore, is: Is stock *properly issued* to subscribers "*paid up capital stock*," within the meaning of our revenue law, whether the issued stock has actually been paid for or not? I think so.

I might well rest my conclusion alone on section 234 of our constitution, which prohibits the issuance of stock "*except for money, labor done, or property actually received.*" The very fact of issuance presumptively presupposes payment.

Elyton Land Co. v. B'ham Warehouse Co., 92 Ala. 407;

Fitzpatrick v. Dispatch Publishing Co., 83 Ala. 604;

Mingo v. Clark, 190 Ala. 388;

Lea v. Iron Belt Merc. Co., 119 Ala. 271.

But, there are other reasons equally compelling to the same conclusion. Section 3446 (6) of the Code of 1907 specifically states that the aggregate of the subscriptions for stock shall be "*the capital stock* with which the company may commence business." When the stock has once been issued the ownership is in the shareholder, although the corporation may retain a lien for the unpaid amount due on it.

Again, this *issued stock* cannot be cancelled or retired except in the manner provided by law. And, in the absence of express legislative authority, a corporation has no power whatsoever to increase or reduce the amount of its stock.

Grangers Life & Health Ins. Co. v. Kemper, 73 Ala. 325;

1 Cook, Stock, Stockh. & Corp. Law, Section 281;

Cook v. Marshall, (Pa.) 43 Atl. Rep. 314;

Knickerbocker Imp. Co. v. State Board, (N. J.) 63 Atl. 913.

The legislature having provided a particular method for increasing or decreasing capital stock, the corporation is restricted to the precise plan provided. As said by Chief Justice Brickell, in Granger's Life & Health Ins. Co. v. Kemper, *supra*.

"When a corporation relies upon a grant of power from the legislature to do an act, it is as much restricted to the mode prescribed by the statute for its exercise, as it is to the particular thing allowed to be done."

In Knickerbocker Imp. Co. v. State Board, (N. J.) 65 Atl. 913, the corporation there cited sought to reduce its franchise tax by buying in some of its own stock. Judge Dill, in answering this argument, says:

"The prosecutor could not avoid its liability to the State to pay a franchise tax based upon the stock is-

sue of \$500,000 by corporate in-buying of its own stock. Stock once issued is and remains outstanding until retired and cancelled by the method provided by statute for the retirement and cancellation of capital stock. * * * The creation by the legislature of a precise method by which, under certain conditions, stock may be retired and cancelled is a clear expression of an intention that such corporation shall accomplish this same result in no other way."

See also:

Walsh v. State, 74 Sou. 49;
Davis v. Montgomery Fur. Co., 101 Ala. 127;
14 Corpus Juris, p. 407, sec. 553.

Section 229 of our constitution, which requires the legislature to provide by general law for the payment of a franchise tax by domestic corporations, states explicitly that such tax "shall be in proportion to the amount of capital stock." The presumption must be indulged that the legislature intended in good faith to comply with this constitutional mandate. Consequently, the words of the statute, "paid up capital stock," must be construed as synonymous with the words "capital stock" contained in the constitution. A definition of "capital stock" and the distinction between "capital stock" and the shares of stock owned by the stockholders are given by Chief Justice Stone in Commercial Fire Ins. Co. v. Board of Revenue, 99 Ala. 1.

See also the following authorities on this and related questions:

6 Cyc. p. 348;
American Pig Iron Co. v. State Board, 29 Atl. 169;
Bank of Commerce v. Tennessee (U. S.) 49 L. Ed.
649;
Smith v. Dana, 77 Conn. 543, 107 Am. St. Rep. 51;
7 R. C. L. sec. 261;
L. & N. v. State, 78 Sou. Rep. 93.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

LICENSES; HOTELS:—Test of liability for license as hotel is the number of rooms open to transient guests for pay.

State Tax Commission,
Capitol.

July 31, 1920.

Gentlemen:

You ask this office to construe schedule 58 of section 361 of the Revenue Law of 1919, which reads in part as follows:

“Each person, firm or corporation keeping a public inn or lodging house of fifteen or more bed rooms where transient guests are lodged for pay shall be deemed for the purposes of this act to be engaged in the business of keeping a hotel.”

The exact inquiry made by you is as to whether the expression “fifteen or more bed rooms where transient guests are lodged for pay” refers only to rooms rented to transient guests, or whether other rooms used exclusively by the proprietor and his family can be counted in making up the requisite number—fifteen. The language of the statute leaves room for only *one* construction. The “fifteen or more rooms”, by the very words of the statute, are rooms “where transient guests are lodged for pay.” If, as in the case stated by you, the *house* has fifteen rooms and five of these rooms are used exclusively by the proprietor and his family, there can be only *ten* bed rooms “where transient guests are lodged for pay.” The test in every case is the number of rooms open to “transient guests” and *not* the number of rooms in the house.

Yours truly,

J. Q. SMITH,
Attorney General.

PROHIBITION LAWS; CONDEMNATION OF AUTOMOBILES:—

Where property sought to be condemned is included in mortgage with other property, mortgage should be satisfied first from the other property and then from such part of proceeds of sale of condemned property as necessary to satisfy same.

Hon. T. M. Patterson,
Clayton, Ala.

August 2, 1920.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 6th inst., in which you make inquiry as to the con-

demnation and sale of automobiles where the amount of the mortgage is equal to the value of the automobile, but the mortgage covers property other than the automobile.

This question has not been submitted to or passed upon by the Supreme Court.

It seems to me, however, that if a mortgagee has a mortgage which covers sufficient property to enable him to collect the mortgage debt without using the entire proceeds from the sale of the car, or any part thereof, the State should have the benefit of such funds as may not be necessary to satisfy the mortgagee's claim. In other words, it seems to me that a mortgagee should not be entitled to collect any part of the proceeds of the sale of the condemned car which is not necessary to the satisfaction of his mortgage. If you have a case which presents this question, and I assume you have, the matter should be placed before the lower court in every possible aspect so as to protect the interest of the state in such way that it may be fairly considered by the Supreme Court.

This presents a somewhat difficult question, especially in cases where the mortgage has not become due and the mortgagee has no right to foreclose or sell the property. In such case it seems to me that provision might be made for the sale of the car, and the proceeds thereof to be held by the register until the mortgagee shall have the opportunity to collect such amount as is possible on other property embraced in the mortgage and if not sufficient to cover his debt that he should then be allowed the entire amount in the hands of the register, or such portion thereof as might be necessary to satisfy his claim.

In the event the mortgage has become due or is about due, it seems to me it would be proper for the court to suspend proceedings in the condemnation case, requiring claimant to proceed to foreclose the mortgage and after this has been done to dispose of the proceeds from the sale of the car turning over to the mortgagee such portion of the proceeds, if any, as might be necessary to fully satisfy his claim, disposing of the remainder as provided for in the condemnation statute.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

LICENSES; VEHICLES; FARM TRACTORS:—Farm tractors are not "vehicles."

August 3, 1920.

State Tax Commission,
Capitol.

Gentlemen:

You ask to be advised whether a farm tractor is a "self-propelling vehicle" within the meaning of schedule 10, section 361 of the revenue law of 1919, which levies a license on dealers in "automobiles, motor cars, or other self-propelling vehicle."

Words used in a statute must be presumed to carry their ordinary meaning, unless a contrary or different meaning clearly appears from the context. A vehicle is defined to be, "any carriage moving on land, either on wheels or runners; a conveyance, that which is used as an instrument of conveyance, transmission, or communication."—Century Dictionary. The same word is defined in Webster's Dictionary: "That in or on which any person or thing is, or may be, carried, as a coach, carriage, wagon, cart, car, sleigh, bicycle, &c., a means of conveyance; specifically, a means of conveyance upon land."

Davis v. Petrinovich, 112 Ala. 657.

A similar question was passed on in Emerson Troy Granite Co. v. Pearson (N. H.) 64 Atl. Rep. 582. The law under consideration here required the licensing of operators of automobiles and motor cycles, defining them as all vehicles propelled by other than muscular power, except railroad and railroad cars, and motor vehicles running only upon rails or tracks, and road rollers. The court, in this case, while conceding that a "traction engine may not be an automobile, motor cycle, or vehicle, according to a strict interpretation of these terms," nevertheless, held that a "traction engine" was included within the meaning of the words used in the statute. The decision seems to be based on the peculiar language of the statute and on the fact that the tractor engine was *used on the public highway*. Quoting from the opinion:

"The statute contains decisive evidence that the term was used in a sense sufficiently broad to include road

rollers—machines that are not used for the carriage of persons, or merchandise. Is it had not been supposed that they were ‘vehicles,’ there would have been no reason for expressly excepting them from the statutory definition. The implication is irresistible that other machines, aside from road rollers, *passing over highways*, (italics supplied) carrying only the operators and the materials used in their operation, are ‘vehicles’ within the meaning of the term as defined in the statute.*** The conclusion is irresistible that the plaintiff’s engine is a vehicle within the meaning of this statute, and should be registered, and its operator should be licensed. *The use of it in highways without registration and license of the operator would be a violation of the statute.*” (Italics supplied.)

It may be that the use of a tractor engine for pulling trucks over the public roads will, in effect, convert it into a motor truck, so as to subject it to the license levied by schedule 7; or the use of it in pulling cars for the conveyance of passengers for hire may subject it to the license levied by schedule 8. But such a liability can be implied only from the *use* of it in this unusual way. To justify the imposition of the license in these cases, the engine and the truck or passenger car attached to it must be treated as a *unit*. When *so used*, it is probably, no longer a *tractor*, but a *truck* or a motor car used for transportation of passengers.

Schedule 10, however, simply levies a license on dealers in automobiles, motor cars, or other self-propelled vehicles. Unlike the New Hampshire statute, there is nothing in the context, or in the general spirit of the law, to indicate that the legislature intended that the word “vehicle” should have any other than its usual and ordinary meaning. There is a license on automobiles and motor cars kept for private use, on automobiles and motor cars used for transportation of passengers for hire, on motor trucks, on dealers in bicycles and motor cycles, &c. But there is no license whatever levied with respect to the use of farm tractors as such.

It is also a rule in the construction of statutes that, where a general term follows a specific enumeration of items or things, the general term includes only those items or things which are in the same class as the things specifically named.

So, in this case, the words "self-propelling vehicles," following the specific words "automobiles" and "motor cars," must be construed as including only those vehicles which belong in the same class with automobiles and motor cars. I do not think that a "farm tractor" can properly be put in this class.

I am of the opinion, therefore, that schedule 10 does not levy a license on dealers in farm tractors.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

LICENSES; AUTOMOBILE DEALERS:—When a concern becomes a corporation continuing the firm name, it must take out new license.

August 4, 1920.

Messrs. Hobbs & Hobbs,
Attorneys at Law,
Selma, Ala.

Gentlemen:

You state the following facts:

On October 29th, 1919, the Selma Motor Company (then an unincorporated concern) took out licenses as an automobile dealer and as operator of a repairing garage, under schedules 10 and 11-a, respectively, of section 361, revenue law of 1919. In December 1919, the Selma Motor Company was incorporated under that name. The corporation retaining the name of the original concern, continues the same business at the same stand.

You ask whether the corporation can continue in business under the old licenses issued to the original concern, or whether it is now liable for new licenses.

Our courts have uniformly held that a license is a mere personal permit, and is neither transferable nor vendible. As stated by Judge Pelham, in *Foshee v. State*, 72 Sou. Rep. 686.

"In either case, the rule prevails that a license tax, or fee, is personal, and cannot, in the absence of specific statutory provision or some positive authorization from which the right can be inferred, be transferred or assigned."

A writ of certiorari was denied by the Supreme Court in this case. 73 Sou. Rep. 999.

The identical rule is also announced in the following cases:

Long v. State, 27 Ala. 32;
Sou. Car & Foundry Co. v. State, 133 Ala. 624;
Sou. Car. & Foundry Co. v. State, 141 Ala. 250;
Jones v. Motley, 78 Ala. 371.

Again, section 363 of our revenue law specifically states that licenses "*shall not be transferable.*"

The corporation is a new and distinct entity, although it bears the name of the old firm.

I am of the opinion, therefore, that the corporation *itself* must take out the licenses levied by the schedules above mentioned.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

LICENSES; CORPORATIONS:—Franchise tax of domestic corporation runs from date of organization, whether corporation actually commenced doing business then or not.

August 6, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You ask to be advised as to the franchise tax due by a domestic corporation under the following state of facts:

This company was incorporated under the laws of Alabama on November 18th, 1919. It claims that it did not begin to do business until March 1st, 1920—the interval between the date of incorporation and March 1st, 1920, being devoted entirely to preparations for beginning business.

The corporation contends that it is not liable for any franchise tax for 1919 and that it is only liable for twelfthths of the full franchise tax for 1920.

I will at the outset quote the provisions of our Constitution and revenue laws necessary to be considered in reaching a right conclusion.

Section 229 of our Constitution provides:

"The legislature shall, by general law provide for the payment to the State of Alabama of a franchise tax by corporations *organized* under the laws of this State, which shall be in proportion to the amount of capital stock."

In compliance with this mandate, section 15 of the revenue law of 1919 requires "every corporation organized under the laws of this State, except, etc.," to "pay annually to the State an annual franchise tax of sixty cents on each one thousand dollars of its paid up capital stock."

Section 17 of the revenue law requires the president of any executive officer or secretary of every corporation subject to a franchise tax to make a written statement under oath to the State Tax Commission, showing the name of the corporation, the amount of its paid up capital stock, &c. Such written statement shall be filed with the State Tax Commission "between the first day of November and the fifteenth day of December of each calendar year, for the franchise tax to be paid for the succeeding calendar year, *if the corporation is doing business* in the state on the first day of November, or between that date and the fifteenth day of December of the calendar year in which the statement is to be made.

Section 19 of the revenue law provides that, if any domestic corporation is organized in the state *and enters upon the doing of business therein* between November 15th and December 31st of the calendar year preceding the year for which the franchise tax is to be levied and collected, the said corporation shall at once file with the State Tax Commission the statement required by section 17; and any domestic corporation that may be organized *and enter upon the doing of business in this state*, after the first day of January of the current year for which the tax is to be collected, shall at once, *upon beginning to do business*, make the statement required by section 17. This section 19 further provides that such corporation *beginning to do busi-*

ness after January 1st of the current year shall be liable for the franchise tax ratably according to the months which are yet to expire during the calendar year, so that payment shall be made for such portion of the year as the corporation *may do business* in this state during the said calendar year.

Before attempting to construe the above quoted provisions of the revenue law of 1919, it is proper to state that they have no bearing whatever on the liability of this corporation for the franchise tax for 1919. Section 26 of the revenue law of 1919 provides that "the first franchise tax to be levied and collected under this Act will be for the calendar year 1920; and the franchise tax law in operation in this state since 1915 shall remain in effect until December 31st, 1919." Therefore, this corporation is liable, if at all, for the 1919 franchise tax, under the law as it existed prior to the enactment of the revenue law of 1919.

Section 16 of the revenue law of 1915 levied an annual franchise tax on all corporations organized under the laws of Alabama of forty cents on each one thousand dollars of paid up capital stock. This Act of 1915, however, failed to fix the time for the payment of the franchise tax or the commencement of the tax year. The Supreme Court, in the case of Williams, Probate Judge, v. Mobile L. & R. R. Co., 195 Ala. 118, solved the difficulty caused by this legislative omission in this way—(quoting from the opinion) :

"While section 16 of the new revenue law (Acts 1915, p. 397) fixes a franchise tax on all corporations and provides for the payment and collection of same, it does not attempt to fix the time for the payment of same or the commencement of the tax year. Therefore, the time for the payment of a franchise tax and the period that the same should cover is fixed by Acts 1911, p. 184, sections 33-E and 33-G, and Code 1907, section 2403.—Counsel for appellant—insist that the franchise tax is a license tax, and the time for paying same and the period it should cover is controlled by section 18 of the Act of 1915 (p. 489) providing and fixing the license or privilege tax to be paid by every person, etc. It may be that a franchise tax has been regarded in some instances as a license tax, and has been spoken of indiscriminately as a license tax, though

a distinction has been generally recognized. *City of Montgomery v. Kelly*, 142 Ala. 552, 70 L. R. A. 209, 110 Am. St. Rep. 43. The case of *Bigbee Fertilizer Co. v. Smith*, 186 Ala. 552, dealt with a remedial statute which provided for the refund of 'license money,' and, as a license was issued in each instance, we held that it applied to the refund of a privilege tax, as well as a license tax. In the case at bar, however, the Legislature has made and recognized a distinction between a franchise tax and a privilege or license tax by dealing with them differently in separate and distinct acts, and we are satisfied that it was not intended that section 18 of the license tax act refers to the franchise tax, as provided by the revenue act in section 16 of the same. Section 18 of the license act only applies to licenses therein treated, and not to taxes provided by the revenue act, which is a separate and distinct law from the license act. We, therefore, hold that the franchise tax provided by section 16 of the revenue act of 1915 (page 397) is due and payable to the 1st of January, and should cover a calendar year; that is, from January 1st to and including December 31st."

It follows, therefore, that when the corporation in question was *organized* under the laws of Alabama, on November 18th, 1919, it immediately became liable for the state and county franchise tax levied by section 16 of the revenue law of 1915 (Acts 1915, p. 397). The corporation having been organized after the first day of July, and before the law of 1919 became operative, is, under the decision in the *Williams* case, *supra*, liable for half the amount of the year's license.

The remaining contention made by the corporation is that, under the express provisions of section 19 of the revenue law of 1919, it does not become liable for a franchise tax until it begins to do business; and that, although organized as a corporation in November 1919, it did not begin business until March 1st, 1920, and is, therefore, only liable for ten-twelfths of the full year's tax.

Section 229 of our Constitution, as above shown, requires the legislature to provide for the payment of a franchise tax by corporations "*organized*" under the laws of Alaba-

ma, "which shall be in proportion to the amount of capital stock." Section 15 of the revenue law of 1919 levies this tax in the very language of the Constitution—*ipsissimis verbis*.

As stated by Judge Somerville, in *K. C. M. & B. R. R. Co. v. Stiles*, 182 Ala. 142:

"The tax thus exacted of domestic corporations is primarily a license tax for the continued exercise of their corporate franchises.—*Sou. Ry. Co. v. Greene*, 160 Ala. 396. The payment of such a tax is one of the conditions imposed by the sovereign power upon its own creatures in consideration of the boon of corporate life and the enjoyment of corporate functions and powers."

Judge Simpson, in *Sou. Ry. Co. v. Greene*, 160 Ala. 408, says:

"The conclusion is that, while a corporate franchise is property, and a valuable asset, of the corporation, yet the term 'franchise tax' may be used to indicate a license or privilege tax—in other words, a tax imposed by the state for the continued privilege of exercising the franchise of the state."

Again in *Spira v. State*, 146 Ala. 178, it is said:

"From an examination of the various statutes on kindred subjects, we do not think that the legislature had in mind any marked distinction between a license tax and a privilege tax, but it seems to have used the words interchangeably. However that may be, it is clear that the interpretation of subdivision 55 is that corporations were to pay a privilege tax proportioned to the amount of their capital stock, and not according to the nature of the business in which they engaged, and that tax was for the privilege of exercising their corporate franchise. When the incorporators have taken the necessary steps, and paid the privilege tax required, they have simply acquired the right to act in their corporate capacity in the state, and stand upon an equal footing with individuals or partnerships

in the State, with the right to engage in any lawful business within their corporate powers, upon the same terms as individuals or partnerships."

Substantially the same definition of a franchise tax is given by Justice Dowdell in *Troy Fertilizer Co. v. State*, 134 Ala. 335:

"It is a license to the corporation as such, and as contradistinguished from a natural person. It is a privilege tax required of these artificial persons *before* they can do business of any character. It is not a tax imposed upon a particular business, and it is, of consequence, wholly unimportant as to the kind or character of business the corporation may engage in, or whether the particular business, as a business, be otherwise taxed or not. It is a license or privilege to enter upon, or into business of any character, as distinguished from the doing and carrying on of some particular business."

The plain language of the Constitution and the several decisions above quoted from compel the conclusion that a franchise tax is simply a tax for the continued privilege of exercising the corporate franchise in the state; and it is in no sense a license on the doing of business.

The revenue law of 1919 must have been enacted with a knowledge of the rule laid down by these decisions. More than that, it was enacted in compliance with a plain Constitutional mandate. This mandate is that the franchise tax shall be levied on every corporation *organized* under the laws of Alabama. The Constitution is the supreme law of the State and the legislature, acting under its mandate, has no right to alter, contract or expand any constitutional provisions.

Board of Revenue v. B'ham, 172 Ala. 138;
Anniston City Land Co. v. State, 160 Ala. 260.

It must be presumed that the legislature intended in good faith to comply with the Constitution. The expression "enter upon the doing of business" found in section 19 can mean only that the corporation has a right to exercise its corporate function.

I conclude, therefore, that the corporation in question is liable for a franchise tax from the date of its organization. Any other construction of the law would violate the uniformity clause of the federal Constitution.

Montgomery v. Kelly, 142 Ala. 552;

Phoenix Carpet Co. v. State, 118 Ala. 151;

Quartlebaum v. State, 79 Ala. 4.

The corporation in question is, therefore, liable for the full franchise tax for 1920 and for half a year's franchise tax for 1919.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

CONVICTS; INDETERMINATE SENTENCE; COSTS:—When convict is given two or more indeterminate sentences, the maximum sentence governs in determining when the second cost bill is to be paid.

August 10, 1920.

Hon. William F. Feagin,
State Warden General,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 9th inst., making inquiry when the cost bill in the second case of a sentence under the indeterminate sentence law is due, that is to say, whether the second cost bill should be paid at the expiration of the minimum or maximum sentence.

At the end of section 6575 of the Code the following language appears:

"No costs shall be paid, until the convict has been delivered to the penitentiary officials, and, where a convict is sentenced in more than one case, the costs in the succeeding cases shall not be paid until he has served the preceding sentences."

The Court of Appeals in the case of Ex Parte Rogers, 82 Sou. 785, in construing the indeterminate sentence law held as follows:

"While certain provisions are made in the law for the parole of the convict after the expiration of the minimum term, there is left no room for doubt that the convict is in the legal custody of the warden of the penitentiary, though under parole, until the expiration of the maximum sentence. We entertain no doubt that the maximum sentence must govern in determining the right to bail in such cases. *Oliver v. Oliver*, 169 Mass. 595, 48 N. E. 843; *Ex parte Melosevich*, 36, Nev. 67, 133 Pac. 57."

An Act of the Legislature of the 1911 session, Acts 1911, p. 626, makes provision for admitting a prisoner to bail pending appeal in cases of conviction for felony where the sentence is for a term of five years or less, and the Court of Appeals in the case referred to having held that "the maximum sentence must govern in determining the right to bail in such cases," I am of the opinion that the maximum sentence must also govern in determining when the second cost bill becomes payable.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

STATE HARBOR COMMISSION; APPROPRIATIONS:—State Harbor Commission may engage only such assistants as are provided for in the 1919 appropriation act.

August 11, 1920.

Hon. Murray Brown,
President State Harbor Commission,
Birmingham, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 10th inst., to which is attached letter from Hon. Elliott G. Rickarby, Attorney for the Commission, to you, dated August 3rd. Mr. Rickarby's letter is returned herewith.

You inquire as to the authority of the Commission to employ a secretary and treasurer, and clerks.

Mr. Rickarby in his letter to you expresses the opinion that the Commission has authority to employ a secretary

without defining his term, and if deemed desirable to proceed to engage the services of Mr. T. P. Hay for the next four months as such secretary and treasurer. He cites sections 7 and 8½ of an Act to create a State Harbor Commission, etc., Acts 1915, page 678. Attention is also invited in this connection to section 57 of the same Act.

Your attention is further directed to an Act of the Legislature of 1919, Acts 1919, p. 985, where certain appropriations are made, and particularly to sections 48, 49, 50 and 51, page 994.

It will be observed from the 1919 act that an appropriation is made for the chief wharfinger's salary at \$2600; for the salaries of three deputy wharfingers at \$1,320 each; for the secretary and treasurer at \$2,400 and for the clerk and stenographer at a salary of \$840 per year.

I am of the opinion that the authority of the Commission to engage the services of employees is limited to the appropriation made for their salaries as set out in the 1919 Act.

Very truly yours,

J. Q. SMITH,
Attorney General.

TAXATION; LIVE STOCK DEALERS:—Horses and mules are not taxed as "merchandise," but such animals brought into the State for sale after October 1st and before assessments are completed are subject to ad valorem taxation as if held and owned in the State on October 1st.

August 11, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You state the following facts:

There are a number of live stock dealers in Alabama who bring horses and mules into the State for sale, after the first day of October. These animals are not, as a rule listed by these dealers for ad valorem taxation. They are not, of course, assessed by the purchaser, as he did not own them on the first day of October. The consequence is that this class of property escapes almost entirely the ad valorem tax for the current tax year.

You ask to be advised whether an assessment can be made against these dealers as merchants, under subdivision "d" section 5, of the revenue law. This subdivision reads in part as follows:

"All stocks of goods, wares and merchandise, the assessment to be on the average amount on hand during the preceding year, but the amount so assessed shall in no case be less than the capital actually employed in the business."

Section 5 of the revenue law, of which the above subdivision is a part, contains an enumeration of all the items of property subject to ad valorem taxation in Alabama. Subdivision "e" of this same section specifically names "all cattle and horses, mules &c." Thus treating live stock as a species of taxable property separate and distinct from stocks of goods, wares and merchandise.

The context of a statute sometimes gives to a word a broader meaning and significance than it usually conveys; but, to have this effect, the legislative intent must clearly appear from the act itself. Live stock is not "merchandise" in the ordinary sense of the word. Quoting from the opinion in *Jewell v. Board of Trustees*, 113 Iowa 51:

"The terms 'merchandise,' 'merchant,' and 'stock' have very well defined meanings. The former conveys the idea of personalty used by merchants in the course of trade, and horses, cattle, and sheep, etc., are not usually included, although, of course, they may be. The last word generally comprehends articles accumulated in a business or calling for use and disposal in its regular prosecution. To speak of sheep purchased for feeding as merchandise, and of a flock as a stock of a merchant, would not be giving the words used their ordinary significance."

11 Michie's Digest, p. 1109, section 127.

"The words of a statute must be taken in their ordinary or popular sense, unless it plainly appears that they are used in a different sense."

I am convinced, therefore, that horses and mules are taxed as such, and not as "merchandise."

This does not mean that these animals which are brought into the State after the first day of October escape ad valorem taxation for the current tax year. Subdivision "M," section 5 of the revenue law, expressly provides that all property brought into the State after the first day of October, and before the assessor has completed his assessment, shall be subject to taxation the same as if it had been held and owned in the State on the first day of October. It is the duty of the assessor and the tax adjuster to compel the listing of this property by the dealers who bring the property into the State. It is just as easy to ascertain the entire number of animals brought in as it is to ascertain the average number and value on hand during the preceding year. Under this construction every animal is subject to assessment. Whereas, if they are assessed as merchandise only a certain proportion of them are taxed. I do not think that a dealer is entitled to this advantage over other owners of live stock.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

TAXATION; EXEMPTIONS; PLANT:—Ship-building plant does not include sand and gravel pit some fifty miles distant.

August 13, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You state the following facts:

A company owns and operates a ship-building plant in Mobile County. In another county—some fifty or sixty miles distant from the plant where the ships are actually constructed—the same company owns a sand and gravel pit, with the necessary machinery to mine or remove the sand and gravel. The sand and gravel so mined is sent to the Mobile plant and used by the Company in building ships. The company claims that the machinery and improvements at this sand and gravel pit are a part of the shipbuilding plant, and, therefore, exempt from taxation

under the provisions of section 3 of the revenue law of 1915. This section reads in part as follows:

"All shipbuilding plants, in the erection, construction and equipment of which not less than one hundred thousand dollars shall have been bona fide expended in that time, together with the buildings, works, machinery, appliances and appurtenances thereof, and all additions necessary or proper for its practical operation made to any such plant, its buildings, works, machinery, appliances and appurtenances, shall be exempt from state, county, municipal taxation and licenses for a period of ten years."

The answer to your inquiry depends largely upon the meaning of the word "plant" as used in the statute.

In the case of *Old Colony Trust Co. v. Standard Beet Sugar Company*, 150 Fed. Rep. 677, it was contended that the "plant" of the sugar beet factory included not only the factory site and the machinery and equipment used in the manufacture of sugar, but that it included also a sugar beet farm some hundreds of miles distant from the factory itself, where raw material was raised for use in the factory. Quoting from the opinion:

"But can it be successfully maintained that the word 'plant' includes land more than two hundred miles from a factory, simply for the reason that it is charged that the lands were purchased for the purpose of securing additional raw material for the use of the factory? * * * * That there may be instances in which courts will hold real estate to be a part of a plant cannot be doubted. The ground occupied by the factory or mill, or even that part adjoining the factory, used for offices or warehouses, may well be treated as a part of the plant; but a large tract of land hundreds of miles from the plant proper, to be used for the purpose of raising the raw material for use in the factory, has never been held to be a part of the 'plant' by any court, so far as the research of counsel or the court has been able to find. If this contention is correct, a miller in Nebraska who invests in a wheat farm of several thousand acres in North Dakota, for the purpose

of raising wheat for its flouring mill, or a cane sugar mill which invests in sugar lands in Cuba, will be held to have included these lands in a mortgage of the mill or factory in Nebraska by employing in the mortgage the word 'plant.'

The various dictionaries define the word "plant" as follows:

The Century Dictionary:

"The fixtures, machinery, tools, apparatus, appliances, etc., necessary to carry on any trade or mechanical business or any mechanical operation or process."

The Standard Dictionary defines it as follows:

"A set of machines, tools, etc., necessary to conduct a mechanical business; often including the buildings and grounds, or, in case of a railroad, the rolling stock, but not including material or product; hence the permanent appliances needed for any institution, as a post office."

The Imperial Dictionary defines the word to mean:

"The fixtures, machinery, apparatus, tools, etc., necessary to carry on any trade or mechanical business. The locomotives, carriages, vans, trucks, etc., constitute the plant of a railway."

In the Encyclopedia Dictionary the word is defined:

"The tools, machinery, apparatus, and fixtures as used in a particular business; that which is necessary to the conduct of any trade or mechanical business or undertaking."

Webster's International Dictionary defines it:

"The whole machinery and apparatus employed in carrying on a trade or mechanical business; also sometimes including real estate and whatever represents investments of capital in the means of carrying on a

business, but not including material worked upon or finished products; as, the plant of a foundry, mill, or railroad."

It will be noticed that two of these authorities expressly exclude material worked upon and finished products from their definition of the word. They all agree that it includes machinery, tools, apparatus, etc., necessary to conduct the particular business.

In *Liberty County Land Co. v. Barnes*, 77 Ga. 748, a saw mill company, which also operated a store or commissary in connection with its business, leased its saw mill property, together with all the buildings, lands, timber, plant, etc., for a term of years. The lessee claimed that the stock of goods contained in the store were included as a part of the "plant." Justice Hall, in delivering the opinion of the court, said:

"We do not think so. 'Plant' as used in this sense, is, according to Webster, the 'fixtures and tools necessary to carry on any trade or mechanical business.' The goods in a promiscuous country store cannot with propriety be denominated either fixtures or tools essential to the conduct of the business or a mill to saw and plane lumber. There are, as far as they have any connection with the milling business, to be taken rather as supplies for the hands and others engaged in the prosecution of the work carried on in the forest, in felling trees and conveying logs to the mill to be sawed into lumber."

This Georgia case, as to the definition of the word "plant" was cited with approval by Chief Justice McClellan in *Sloss-Sheffield Steel & Iron Co. v. Mobley*, 139 Ala. 436.

30 Cyc. p. 1637:

"Plant.—All the matters permanently used for the purposes of a trade, as distinguished from the fluctuating stock." And cases cited in the notes to this section.

See also:

Clifton v. Montague, (W. Va.) 52 Am. St. Rep. 876-7;

Maxwell v. Dental Mfg. Co., 77 Fed. Rep. 941;
6 Words & Phrases, page 5,400;
Sou. Bell Tel. Co. v. D'Alemberte, (Fla.) 21 Sou.
570;

It seems clear from these definitions and decisions that the word "plant" implies the idea of unity. A shipbuilding plant is a plant where the ships are built. Steel plates are as necessary in the construction of ships as sand and gravel. Lumber is as necessary as both. If this company owned a steel mill in Birmingham and a saw mill in Clarke county, each one under the construction contended for, would be entitled to exemption as a part of the shipbuilding plant. All claims to exemption from taxation must be strictly construed and I cannot believe that the legislature intended to so extend this exemption as to include allied, but separate and distinct, plants. The language of the Supreme Court of Wisconsin in Dinsmore v. Racine & Mississippi R. R. Co., 12 Wis. 655, is very pertinent in this connection:

"It is said that these lands were purchased by the (railroad) company for the wood and timber upon them, which were to be used upon the road. Upon the score of economy it might be desirable that a railroad corporation should own the woodland and coal beds from which it could obtain all necessary fuel. So perhaps it might be convenient for it to own pine lands from which it could obtain lumber for fences and bridges, and mills to manufacture the lumber; or a line of steamboats for the transportation of freight and passengers by water to and from the road. Still these things are not at all necessary for the full enjoyment and use of the road and franchises. A railroad corporation can purchase its fuel as well as a natural person."

Without attempting to expressly define the scope of the exemption allowed shipbuilding plants, I am certain that it cannot include a sand and gravel plant situated some distance from the shipbuilding plant, proper.

Very truly yours,

HENRY P. WHITE,
Assistant Attorney General.

LICENSES; AUTOMOBILES:—Counties may impose additional license on commercial cars but not on private vehicles.

Hon. J. P. Middleton,
County Solicitor,
Hamilton, Ala.

August 13, 1920.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 10th inst., with reference to vehicle tax.

It will be observed that the Acts of 1919, page 399, section 9 provides that:

"The registration fee or license tax herein required to be paid on motor vehicles shall be in lieu of all other privileges or license taxes, which the State or any county or municipality thereof might impose where the motor vehicle is used by the owner for *his private use and that of his family.*" (Italics ours.)

I am of the opinion that the court of county commissioners have the authority to require the payment of this tax which is authorized by the 1915 Act on all vehicles except such motor vehicles as may be used by the owner for his private use and that of his family, as to which I am of the opinion that the court of county commissioners are without authority to require the payment of this tax.

I am, therefore, of the opinion that the court of county commissioners have the authority to levy a tax on all motor vehicles used for commercial purposes.

Yours truly,

J. Q. SMITH,
Attorney General.

BOARD OF CONTROL AND ECONOMY; PRINTING AND BINDING:—Code sections 1647 and 1648 were not repealed by act of 1919.

August 14, 1920.

Hon. C. B. Rogers, Chairman,
Board of Control and Economy,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 13th inst.

The 1919 Act which you refer to, provides that your Board is vested with control and authority over and charged with the duty of providing for the public printing and binding designated in section 69 of the Constitution, and more particularly set forth in sections 1647 and 1648 of Chapter 40, Political Code, and section 578 of Chapter 19, Article 2.

I am of the opinion that sections 1647 and 1648 and section 578 of the Code are still in effect.

After referring to the provision of the Constitution covering the subject of printing and binding and stating that this subject is generally covered by sections 1647 and 1648 and section 578 of the Code, a semicolon is inserted in the law, thereby making a break between what is said up to that point and the following statement, which is:

“* * * * * and sections 1649 to 1655, inclusive, and sections 1657, 1658, 1660 and 1662, of said chapter 40, of the Political Code are hereby repealed.”

It seems clear to me that the semicolon is the dividing line between the sections of the Code where the subject of printing as referred to in section 69 of the Constitution is dealt with, and the statement that certain other sections of the Code are repealed.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

LEGISLATION; COUNTY BONDS:—Act of Legislature of 1919 authorizing issue of interest-bearing warrants was invalid because of omission of enacting clause.

August 14, 1920.

Dr. C. A. Cary,
State Veterinarian,
Auburn, Alabama.

Dear Sir:

I beg to acknowledge receipt of your letter of August 11th, in which you ask to be advised whether or not an act of the Legislature of 1919, entitled an “Act to authorize and empower the court of county commissioners, the Board of Revenue, or other governing body of the several counties

of this state to issue interest bearing warrants of the county in settlement of debts or other obligations incurred in the construction or maintenance of public roads or money borrowed for tick eradication or necessary public buildings, or as a security for money borrowed for the payment of such debt or obligation, and to regulate and prescribe the method of issuing such interest bearing warrants," approved by the Governor on September 30, 1919, is valid or invalid, owing to the failure of said act to contain an enacting clause, as provided for in section 45 of the Constitution of Alabama of 1901.

I beg to advise that I have inspected the original bill passed by the Legislature, and the enrolled bill in the office of the Secretary of State, and I find that it does not contain the enacting clause.

Section 45 of the Constitution of 1901 provides that the style of the laws of this State shall be, "Be it enacted by the Legislature of Alabama." This clause is commonly called the enacting clause.

I am clearly of the opinion that section 45 of the Constitution is mandatory, and there are many cases from all jurisdictions in the United States, upholding this contention. The decisions are too numerous to mention, and I have no doubt our Supreme Court would follow this line of decisions.

I am of the opinion, and so advise, that by reason of the omission from this bill of the enacting clause, as provided in section 45 of the Constitution, it is null and void.

This office is reluctant, always, to strike down a solemn act of the Legislature, but in this case it is obvious that the plain mandate of the Constitution has not been complied with by the Legislature in the enactment of this law.

Very truly,

J. Q. SMITH,
Attorney General.

ALABAMA DENTAL ASSOCIATION; ACCOUNTING:—The president of the Alabama Dental Association may employ an auditor, to be paid from funds of the association.

August 14, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of August 13th, in which you wish to be advised as to whether or not the Alabama Dental Association, created by an Act of the Legislature of 1915, page 332, and an Act of the Legislature of 1919, page 784 amending said act, has authority to employ an auditor to examine the books of the secretary and treasurer of said Association.

I am of the opinion, and so advise, that the President of this Association has authority to employ an auditor to examine the books of the secretary and treasurer of said Association, and that he can pay said auditor out of the funds of said Association by having the secretary and treasurer draw a check, countersigned by the President. This Association is charged with the collecting of certain fees, and the administering of the dental laws of Alabama; the secretary and treasurer is required by said act to give bond, payable to the Alabama Dental Association.

Very truly yours,
J. Q. SMITH,
Attorney General.

LICENSES; FIRE SALES:—Merchants advertising and holding fire sales are liable for license under schedule 51 of 1919 revenue law.

August 14, 1920.

State Tax Commission,
Capitol.

Gentlemen:

You state the following facts: A merchant doing business in the regular way in a city of Alabama has a fire in his place of business which damages his stock of goods. After this fire he advertises his stock of goods for sale at reduced prices, and states in his advertisement that such sale

is by reason of the goods having been damaged by fire. He then conducts this sale himself through the regular clerks and help employed in the business.

You wish to be advised whether such merchant is liable for a license under schedule 51 of section 361 of the Revenue Law of 1919. This schedule requires a license of one hundred dollars before any person &c "shall sell or be engaged in the business of selling goods, wares and merchandise, such sales being advertised as bankrupt, insolvent, * * closing out sale or as goods damaged by smoke, fire, water or otherwise," &c. The applicant for this license must state in his affidavit accompanying the application all the facts, relating all the reasons for and character of such sale so advertised, including the names of the persons from whom the goods were obtained and the date of delivery to the person applying for the license. These details are required in order "to exactly locate and fully identify" the merchandise proposed to be sold. This schedule expressly provides that it "shall not apply to bona fide sales of general assignees for the benefit of creditors, or bona fide trustees selling under power of sale in any deed of trust, executors and administrators selling the goods of their decedent, or to any other officer selling the property under legal process, or to regularly licensed auctioneers selling bona fide at public outcry in the usual course of their business."

There is nothing whatever in this schedule to indicate that the legislature intended to exempt merchants, whose stock on hand had been damaged by fire, from the payment of this license. The license is specifically levied on "any person, firm, or corporation" who shall sell or be engaged in the business of selling goods," such sale being advertised as set forth in the statute. The express exemption of certain named parties from the payment of this license tends further to the conclusion that none except those named are exempt. The license seems particularly directed to the manner of advertising the sale—very probably for the purpose of preventing unfair competition among merchants. It may be said to be almost a matter of common knowledge that among a certain class of merchants a fire in a store is invariably followed by a fire sale. This sale being advertised in the most alluring and attractive way possible. The legitimate merchant, not having had any fortunate vis-

itation of fire, must suffer the loss of customers lured away by the advertised promises of bargains. As I conceive it, the legislature considered such a sale an illegitimate interference with the usual course of trade and sought to regulate or restrain it in a measure by the imposition of a high license. This license bears some analogy to the heavy license levied on labor agents. Both are primarily intended to restrain the business licensed.

I am of the opinion, therefore, that the merchant in question is liable for the "fire sale" license levied by schedule 51 of the Revenue Law of 1919.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

CIRCUIT CLERK'S FEES:—No provision is made for fees to circuit clerk for summoning witnesses to appear before grand jury in cases where no indictment is found.

August 16, 1920.

Hon. John F. Avery,
Clerk Circuit Court,
Columbiana, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 13th instant, inquiring as to whether you have a right to collect costs for subpoenaing witnesses to appear before the grand jury in cases in which no indictment is found.

This identical question with reference to sheriffs' fees was decided in the case of Board of Revenue, etc. vs. State ex rel Drago, Sheriff, 172 Ala. 155, it having been decided in that case that the Sheriff was not entitled to collect fees for summoning witnesses to appear before the grand jury in cases in which no indictment was found.

In the case referred to the court does not mention section 6889 of the Code, providing for the payment of officer's costs in certain cases. The cases, however, are limited to cases in which defendants have been tried and convicted, and have been proved insolvent by the return of executions "no property found" or in cases in which the

State enters a *nolle prosequi* or where the indictment has been withdrawn or the prosecution abated by the death of the defendant. This section, it will be observed, does not make any provision for the payment of costs in cases in which no indictment is found, and I am of the opinion that there is no provision for the payment of clerks' fees for summoning witnesses to appear before the grand jury in cases in which an indictment is not found by the grand jury.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

TICK ERADICATION; RETROACTIVE LAWS:—Claims for damages to stock accruing before the passage of the 1919 act cannot be paid under that act.

August 17, 1920.

Hon. Frontis H. Moore,
County Solicitor,
Wetumpka, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 16th inst., to which is attached letter from Hon. Geo. F. Smoot to you dated Aug. 16th.

Mr. Smoot refers to the Act of the Legislature, approved Sept. 30, 1919 (Acts 1919, p. 1082), entitled "An Act to authorize the Boards of Revenue or County Commissioners of the several counties of the State of Alabama, in their discretion, to indemnify owners of cattle for injuries, damages, or death caused by dipping such cattle in compliance with the laws of the State, etc." He states that the Commissioners of Elmore County have allowed and passed a claim in favor of the owner of certain cattle to compensate him for the death of the same, caused by the negligence of a regularly qualified inspector in seeing that the standard arsenical solution was used in dipping same, the negligence complained of and the death of the cattle both having occurred prior to the passage of the Act, and asks for an opinion as to whether a warrant for such claim which has been presented to him as County Depository for payment, should be paid.

This inquiry raises the point whether the Act in question is prospective only in its operation or whether it also has a retrospective operation.

In the case of Coosa River Steamboat Co. vs. Barclay & Henderson, 30 Ala. 120, Mr. Justice Stone, speaking for the Supreme Court, laid down the following general principles of law governing the power of the Legislature in passing and the construction to be given to statutes of this nature, as follows:

(1) "It is not within the power of the Legislature to take away vested rights," citing numerous authorities.

(2) The Legislature may alter, enlarge, modify, or confer a remedy for existing legal rights without infringing any principle of the Constitution," citing a number of authorities.

(3) "It is not within the power of legislation to create a cause of action out of an existing transaction, for which there was at the time of its occurrence, no remedy," citing several authorities;

(4) "Statutes which relate only to the remedy, without creating, enlarging, or destroying the right, operate generally on existing causes of action, as well as those which afterward accrue," citing numerous authorities.

It appears to me to be entirely clear that the statute here involved would lie in the third class above referred to, as it would, in my opinion, undoubtedly create a liability out of an existing transaction, for which there was at the time of its occurrence, no remedy, provided the proper construction of the statute should result in the conclusion that the payment of this claim is authorized by its provisions.

While I am of the opinion that if the language as it appears from the face of the Act be considered alone, it could be said with some show of reason to cover all claims of the class referred to, irrespective of whether such claims arose prior to or have accrued or may accrue subsequent to the approval of the Act; if the Act is reasonably susceptible of the construction that it only covers subsequent claims, which view is necessary to uphold the statute, the princi-

ples which control the construction of statutes, require that such construction be applied, and it appears to me to be equally clear that such construction is entirely consistent with the language of the Act. In fact the expressions "And provided that no county *shall be liable*" and "death or damage which *may be caused*," appearing in sections 3 and 4 of the Act tend to support the conclusion that it was the intention of the legislature that all claims which might be paid under the provisions of the Act must be only those which should accrue subsequent to the passage and approval of the Act.

The third rule laid down in Coosa River Steamboat Co. v. Barclay & Henderson, *supra*, on which we rely is again stated in Steele et al vs. Steele's Adm'r. 64 Ala. 438, 452.

The most exhaustive consideration given to this question which we have found among the decisions of our Supreme Court is set forth in Barrington vs. Barrington, 76 South. 81, in which a number of Alabama cases are cited. In the cases cited the court held that "the future is the appropriate field of legislation, and a statute is never allowed to have a retrospective operation, *unless clearly so expressed*, or unless such implication *must be made* to give effect to the manifest intent of the Legislature," "the very essence of a new law is a rule for future cases;" "a construction which gives to a statute a retrospective effect has always been esteemed odious and will never be indulged unless the language employed required it. Such statutes are justly considered as violative of every sound principle;" "when the words of a statute can be construed as intended to be prospective only, they will not be construed as to give retroactive effect."

In the Barrington case, *supra*, Mr. Justice Somerville, speaking for the court says:

"It is certainly true that this language is broad enough, *prima facie*, to embrace any suit for divorce that might be thereafter filed, and does not exclude from operation to that end a statutory term of years begun howsoever long before the enactment of the law. But we cannot say that it necessarily or clearly includes such a case. The use of the verb in the present perfect tense is appropriate, and perhaps necessary to express the idea of completion merely—the perfection

of the designated term in the abstract, rather than the mere lapse of time already passed in particular cases. Such a use of the perfect tense of verbs is not only appropriate but common.

"It may be that courts should indulge the presumption that the draftsmen of legislative acts have used language with the nicest perception of its shadings of grammatical meaning, but such a presumption is, at best, but weak and inconclusive; 'and so (as remarked by Mr. Endlich), as it has been seen that the strict grammatical sense of the language used by the Legislature may give way to a construction required by other rules of interpretation, words apparently importing a retroactive effect will yet, in the absence of other reasons supporting such literal construction, be so construed as to produce a prospective operation.' Endlich on Tit. of Stat. par. 272."

It might be argued that inasmuch as the statute makes it discretionary with the Board of Revenue or Court of County Commissioners as to whether they will pay such claims, it does not create a liability against the county, and that the authorities on that point cited above do not apply. However this may be, under the general rule that statutes are not to be construed as having a retrospective operation unless it clearly appears therefrom that such construction was intended or such implication must be made to give effect to the manifest intent of the Legislature, I do not think the language of the Act justifies a construction to the effect that a retrospective operation was intended. In fact, certain phrases of the Act above quoted tend to show to the contrary that the Legislature intended for the Act to have prospective operation only. "When the words of a statute can be construed as intended to be prospective only, they will not be construed so as to give a retrospective effect." *Barrington vs. Barrington*, supra.

I am clearly of the opinion that the proper construction of the Act, under the rule laid down in the decisions of the Supreme Court above cited, forces the conclusion that the Act covers only such claims as have accrued and may accrue since the date of its approval.

It, therefore, follows that the claim here involved, and all other claims which accrued prior to Sept. 30, 1919, when

the Act was approved, should, in my opinion, be declined on the ground that they do not come within the provisions of the Act, and that payment of the warrant which has been presented for payment, as stated above, should be refused.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

DOG LAW:—Dogs are liable for tax immediately upon reaching three months. Dogs three months old or over brought into the State after October 1st are liable for tax.

Hon. A. A. Evans,
Care State Tax Commission,
Capitol.

August 19, 1920.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 10th instant, in which you make several inquiries concerning the Dog Registration Act (Acts 1919, page 1077).

The first three questions relate to dogs owned or kept in the State, and those brought into the State, which are three months old or less on October 1st of any year.

I am of the opinion that on or before October 1st of any year this tax should be paid on all dogs over the age of three months, and that between that date and October 1st of the succeeding year, all dogs in Alabama, as soon as they become over three months old, immediately become subject to the payment of the tax for that year; also that all dogs three months old or over, brought into and kept in the State, as referred to in section 4 of the Act, for more than thirty days, are also subject to the tax, regardless of whether such dogs were more than three months old on October 1st preceding.

As I construe this statute, it provides for a license or privilege tax for owning or keeping in Alabama a dog over three months old during the year from October first to October first, or bringing such dog into the State and keeping it here for more than thirty days. It appears to me to be clear that it was the intention of the Legislature that all dogs which were on October 1st over three months old, or

should attain such age during the succeeding year, should wear the tag provided for, and the owner or keeper should pay the required fee.

Nothing appearing in the Act to the contrary, there would seem to be no more reason for the exemption of a dog which becomes more than three months old after October 1st than there would be for exempting any one who might exercise any privilege during a portion of a year for which a license tax is required from the payment of such license for that year. It is a well settled proposition of law in this State that this cannot be done, and that every one must pay the tax for the full year even though the privilege may be exercised for only a part of the year, notwithstanding the fact that a privilege tax has already been paid by a previous owner, the statute not providing for a transfer of the license, *Foshee v. State*, 72 South. 685. In recognition of this principle, statutes have in recent years been passed in Alabama providing for payment of the tax for only a portion of the year in cases in which the privilege has been exercised for only a portion of the year. No provision is made in this act for payment of part of a year.

The tax is laid on all dogs of a certain class—over three months old—and any one owning or keeping in Alabama, or bringing into Alabama, such dogs, is liable for the tax, and his dog must wear the required tag provided for that year.

Enclosures herewith returned.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

TRIAL TAX:—Trial tax is imposed in every case going upon the docket, regardless of subsequent dismissal.

August 19, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 18th instant, in which you request an opinion as to section 41½ of the 1919 Revenue Act.

This section provides that, "A trial tax of three dollars be and the same hereby is, imposed in each case * * * *which hereafter goes upon the docket.*"

It seems entirely clear that the tax is imposed in every case which goes upon the docket, it being wholly immaterial whether the case be tried or not. The statute provides that this item shall be taxed as costs in every case which is docketed, not every case which is tried.

The docketing of the case in court is the first step in the court leading up to a trial, and the State is not concerned with whether a litigant may later decide to adjust the case or go to trial.

The class of cases on which the tax is imposed is what controls, rather than the name which is applied to the tax. It is referred to as a "trial tax," but the word "trial" might have been omitted, or the expressions "docket fee" or "docket tax" used in lieu of the words "trial tax" and the result would be the same.

Yours truly,
J. Q. SMITH,
Attorney General.

DOG LAW; LEGISLATION:—Dog law not a revenue measure.

August 20, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

The Attorney General's office is in receipt of your letter of the 19th instant, concerning the Dog Registration Act.

I note from your letter that Mr. Wall, Solicitor for Limestone County, entertains the view that this statute is unconstitutional, in that it is construed by him as being a revenue measure, and was passed during the last five days of the session, in violation of section 70 of the Constitution of Alabama, which provides that "no revenue bill shall be passed during the last five days of the session."

I do not consider the Act a revenue measure, it appearing to me to be clearly a police measure. In support of this view I quote from the 5th headnote from the case of *Bozeman v. State*, 61 South. 604, as follows:

"Acts 1911, p. 634, imposing a license tax or registration fee on motor vehicles, is an exercise of the police power, and not a revenue measure, although the amount of the tax is in excess of the necessary expense of regulating and controlling the operation of such vehicles, since the tax is imposed for a specific and burdensome use of the highways, and the fund derived therefrom is apportioned among the governmental subdivisions upon which the burden of maintenance of the highways rests, and the portion retained by the State is much less than the amount paid from the State treasury for the improvement and betterment of highways; and hence, although passed on the last day of the legislative session, that act is not invalid under Const. 1901, sec. 70, providing that revenue bills shall not be passed during the last five days of the session."

The caption of the Dog Registration Act recites that it is an Act, "For the protection of human beings and of livestock of all kinds," etc., and the body of the act supports this provision of the caption, as the act provides that the fund derived from the payment of such taxes "shall be kept separate and apart from all other funds, and shall be known as the dog tax fund." The act also provides for paying claims for injuries that may result to owners of animals which may be injured by dogs and for the treatment of persons who may be bitten by rabid dogs. Payment for all supplies needed in the enforcement of the Act must also, under the provisions of the act, be made from such fund.

It appears to me to be entirely clear that the Act is a police measure and not a revenue measure, it being primarily an act providing for the protection of persons and property. It is entirely problematical as to what, if any, benefit may accrue to the State from a revenue standpoint, the tax being very light, much more so than in the case of motor vehicles, as to which the court ruled that the act providing for a registration fee on such vehicles was "clearly the exercise of the right to exact a license tax under the police power of the State."

Yours truly,
J. Q. SMITH,
Attorney General.

LICENSES; LABOR AGENTS:—Railroad corporations not liable for license as labor agents for employing laborers to work outside the State.

August 21, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 20th instant, asking for a ruling on schedule 129 of the Revenue Act, providing for a license on Labor Agents. This section provides for the payment of the license by "each person who shall engage in the *business* of hiring or soliciting laborers to go or to be employed outside of Alabama, or in furnishing, or arranging or providing transportation for laborers to go beyond the limits of Alabama, or in advertising for such laborers," and that "all assistants, subagents, partners, associates or employees of any such person shall be subject to the license hereby levied, whether such license be paid by their employer, principal, or partner, or not." It being further provided that, "A common carrier engaged in interstate commerce shall not in transporting any passengers or in employing or transporting laborers to work for it, shall not be a labor agent within the meaning of that term as herein defined."

The Court of Appeals of Alabama, in *Braxton v. City of Selma*, 79 South. 150, had, previous to this statute, ruled that a railroad section hand of an interstate carrier, who, under orders from a foreman, employed laborers to take the places of those who had left the employment, did not violate a city ordinance prohibiting engagement without license in the business "of seeking to induce laborers" to remove from the city, out of the State, the court holding that the word *business*, as used in the ordinance, meant employment occupying time, attention, and labor for the purpose of livelihood.

The exemption in favor of common carriers engaged in interstate commerce in schedule 129, as above quoted, is in harmony with the holding of the Court above referred to. I am therefore of the opinion that such a carrier has the right through its agents to employ laborers in this State for the purpose of carrying them into another State for

service, without the carrier or its agents being subject to the license referred to.

This exemption from the payment of the license does not, however, confer the right upon such parties to entice away servants, or apprentices, which is made a criminal offense by section 6849 of the Code of 1907, or to entice away servants, renters, or laborers under written contract, which is made a criminal offense by the provisions of section 6850 of the Code of 1907; or to entice away apprentices, or immigrants from employers, which acts are made criminal offenses by sections 6853 and 6854, respectively, of the Code of 1907. Any one violating the provisions of these sections of the Code would be subject to criminal prosecution, notwithstanding the exemption from payment of the license as above referred to.

Yours truly,
J. Q. SMITH,
Attorney General.

PLAT BOOKS; TAX ASSESSORS:—Where Commissioners Court refuses to pay for making out plat book the assessor must either do the work or have it done, for which a liability is created against the county for reasonable compensation.

August 25, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Sections 67 and 68 of the revenue law of 1919 require the tax assessor to make or cause to be made a complete plat book of all real estate in his county. They further provide that the court of county commissioners "shall pay out of the general fund of the county a reasonable amount of money as compensation to the person making out such book." Section 70 of the revenue law exacts a penalty of five hundred dollars from the tax assessor if he fails to comply with the requirements of these sections.

You state that there are instances where county commissioners are refusing to pay for this work and probably other instances where they are refusing to make any agreement as to the amount which will be allowed for the work.

This, of course, renders it difficult for the tax assessor to have the work done, as no one is willing to do the work without some advance assurance as to the compensation he will receive.

You wish to be advised whether there is any way to force the commissioners court to have this work done.

I appreciate fully the seriousness of the situation and the embarrassment under which the assessor labors, but the law imposes the duty on the *assessor*, and not the commissioner's court; and it penalizes the assessor for his failure to comply with those provisions. He must either do the work himself or have it done. When the work is done a legal liability is created against the county for a "reasonable amount of money as compensation." If the claim for compensation is denied in toto, or if allowed for less than a "reasonable amount," the proper compensation can be recovered by suit. What is a "reasonable amount" then becomes a question for the court or jury. The commissioners court must, of course, first pass on the claim, because the law requires it—Code 1907, section 2472. But their act in allowing or disallowing the claim, while a prerequisite to suit, is a mere administrative act and not judicially determinative of the amount the claimant is entitled to receive.

Mobile County v. Williams, 180 Ala. 647. It results that the tax assessor cannot know with certainty what compensation will finally be allowed. He does know that it will be a "reasonable amount" and this amount can be arrived at only in the way prescribed by law.

The legislature could have imposed these new duties on the assessor without any extra compensation, for one who accepts a public office must take the office *cum onere*.—*Mobile County v. Williams*, *supra*.

The liability of the tax assessor on his official bond for failure to comply with these provisions of the revenue law is clearly established in *Norton v. Kumpe*, 121 Ala. 446.

Yours truly,
J. Q. SMITH,
Attorney General.

PROHIBITION LAWS:—Proceeds of sale of condemned property should be immediately remitted to the State Treasurer, and no part may be applied to payment of costs in other cases in which condemnation failed.

August 26, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

Replying to your inquiry contained in letter of the 25th of this month, I beg to advise that under the provisions of section 13 of the Act approved January 25, 1919, (Acts 1919, p. 13) the proceeds of the sale of property which belong to the State after the payment of the items of cost enumerated in the statute should be immediately remitted to the State Treasurer. No authority exists for applying such fund to the payment of costs in similar cases in which the State failed to condemn the property.

Very truly yours,
J. Q. SMITH,
Attorney General.

BANKS:—A firm is engaged in "banking business" if it lends money on cotton, holding same on deposit, and allowing customers to check on the amount so deposited.

August 26, 1920.

Mr. D. F. Green,
Superintendent of Banks,
Montgomery, Alabama.

Dear Sir:

You left at this office a letter from Messrs. John C. Webb and Sons to you, dated August 23, 1920, with a request for an opinion as to whether these parties are engaged in the banking business.

An Act to amend the Act by which the Banking Department was created, Acts 1919 p. 818, Sec. 1, provides that "the word 'bank' as herein used means any person, firm, partnership or corporation doing or carrying on a banking business," etc.

In 7 C. J., p. 474 sec. 2 it is said that "Banks are of three kinds: (1) Banks of deposit, which include savings banks and all others which receive money on deposit; (2) banks of discount, being those which loan money on collateral or by means of discounts of commercial paper; and (3) banks of circulation which issue bank notes payable to bearer. But the same bank generally performs all these several operations."

The Supreme Court of the United States in *Warren vs. Shook*, 23 L. E. 421, 423 held that "Having a place of business where deposits are received and paid out on checks, and where money is loaned upon security, is the substance of the business of a banker."

In *People vs. Brewster* (N. Y.) 4 Wend. 498, 500 the court held that the Act prohibiting the carrying on of banking business by individuals and incorporated companies, unless specially authorized by law, did not preclude individuals or corporations, if otherwise authorized, from lending their funds on promissory notes by way of discount or otherwise; that the evil intended to be guarded against was the keeping of an office of deposit for the purpose of carrying on the banking business.

In *State vs. Compton National D'Escompte de Paris* (La.) 26 South. 91, 95 the Court held that a banker is one having a place of business where deposits are received and paid out on checks, and where money is loaned on security, stating that it seemed at least these elements must coincide in order to bring a person within any definition of banker.

In *State vs. Leland* 91 Minn. 321, 98 N. W. 92, 93, the court held that a bank could not by naming itself as a brokerage concern conduct the banking business and receive deposits, the same as a bank, without being in fact subject to the statute regulating banking, that individuals were not prohibited from engaging in, but were permitted to conduct, banking business.

It appears from letter above referred to that Webb and Sons loan money on cotton equal to 60 per cent of the value thereof, holding on deposit such amount as may be due each person allowing such person to check upon such amount as he may have on deposit on account of such loan by means of a check book issued for that purpose, the blanks for such checks being the usual form of bank checks.

Under the facts and the law as stated above, it is my opinion that these parties are engaged in the banking business within the purview of the Alabama statutes regulating the business of banking in this State.

Letter of Webb and Sons is herewith returned.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

LICENSES:—Failing to take out license implies mere omission; refusal to do so is an act of the will.

August 27, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Section 367 of the revenue law of 1919 makes a distinction between *failing* and *refusing* to take out a license required by that law, and provides a different penalty for each offense.

You ask this office to define what constitutes "refusing" to take out a license.

There is nothing in the act to indicate that these words are used in any other than their ordinary sense. "Fail" means merely an omission to perform the act. "Refuse" means a denial of any thing demanded, solicited or offered for acceptance. "'Refusal' implies demand, knowledge or notice. A party cannot be said to refuse to do a thing of which he knows nothing." *Mutual Life Ins. Co. v. Hill*, 178 U. S. 347, 350, 44 L. Ed. 1097. "Fail" means to leave unperformed; to omit; to neglect, as distinguished from refuse, which latter involves an act of the will. 19 Cyc. p. 308.

It seems clear, therefore, that a party cannot be punished for "refusing" to take out a license, unless such refusal is *after* demand made on him. Section 366 of the revenue law requires the license inspector to cite delinquents to appear before the probate judge and take out the licenses required by law. If a delinquent still refuses, after a demand and a reasonable opportunity given him, to take out

the license, then, in my opinion, he subjects himself to the penalty for "*refusing*" to take out the license.

Yours truly,
J. Q. SMITH,
Attorney General.

LICENSES; PEDDLERS:—Sale of merchandise from wagons constitutes peddling. Peddlers' license cannot be taken out for corporations, but for each driver of a wagon.

August 28, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You state the following facts:

A foreign corporation, which operates stores in nearly all the larger cities and towns of the State, sends out wagons, which it calls delivery wagons, but which in fact are not delivery wagons, as the term is generally understood, except for a small part of the business done. It is true that the wagons do deliver merchandise which had been previously ordered, but the principal business done from these wagons is the sale of goods from the wagons which had not been previously ordered.

You wish to be advised whether there is any liability for a peddler's license under these circumstances; and, if so, whether one license should be taken out in the name of the corporation, or whether a separate license should be required of each driver of each wagon.

Schedule 80 of the license law of 1919 reads in part as follows:

"Peddlers of merchandise, other than medicine, fifteen dollars for each county in which they peddle. Peddlers, except peddlers of medicine, etc., when traveling in vehicles shall pay thirty-five dollars for each county in which they peddle. Provided that no peddler's license shall be required of Union and Confederate veterans of the civil war, nor of persons totally blind, nor of persons who are physically disabled to do

manual labor, who shall obtain a certificate from the County Health Officer as to such disability, nor shall this schedule be construed to require a license of peddlers of fish, oysters, game, fresh meats, fruits and all farm products raised by the seller."

The sale of merchandise from so-called delivery wagons, in the manner stated above, comes clearly within the meaning of this schedule and constitutes peddling.

A peddler is thus defined by Chief Justice Stone in *Randolph v. Yellowstone Kit*, 83 Ala. 472:

"Its popular signification is a small retail dealer, who, carrying his merchandise with him, travels from house to house, or from place to place, either on foot, on horseback, or in a vehicle drawn by one or more animals, exposing his goods for sale, and selling them; and in the absence of something in the statute to control us, we must interpret the language employed by the legislature in its popular sense."

It has been held that a corporation cannot be a peddler.

21 R. C. L., p. 183:

"It is fundamental that no one may be a peddler who does not go from place to place seeking sales. There must be movement by the peddler. Therefore a corporation cannot be a peddler."

Crall v. Commonwealth, 49 S. E. (Va.) 639:

"The law is well settled that a corporation may be punished criminally for peddling through the medium of an unlicensed agent. While a peddler's license cannot issue to a corporation as such, it is competent for a corporation desiring to peddle its goods to take out license in the name of a designated agent, and such agent may lawfully peddle the goods of the principal."

See also:

Standard Oil Co. v. Commonwealth, 55 S. W. 8;

Wrought Iron Range Co. v. Johnson, 84 Ga. 754.

The exemption of Union and Confederate veterans and of persons totally blind, or physically disabled, from the pay-

ment of a peddler's license indicates that the legislature had only natural persons in mind. Unlike the other schedules, this license is not levied on each "person, firm, or corporation," but is levied specifically on "peddlers." Giving that word its usual signification, it refers only to natural persons.

I conclude, therefore, that a license cannot be taken out in the name of the corporation. It must be taken out in the name of the person who actually does the peddling. A separate license is required of each person. In this case, each driver of a wagon must have a peddler's license.

Yours truly,

HENRY P. WHITE,
Assistant Attorney General.

LICENSES; PEDDLERS:—Ice peddlers are liable for peddler's license.

August 30, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You state that there are in nearly every city of the State men who peddle ice from their own wagons. They do not represent any ice factory, but buy the ice in large quantities and sell it from their wagons at retail.

You ask whether such ice peddlers are liable for a peddler's license under schedule 80 of the revenue law. This schedule fixes a license of thirty-five dollars for each county on "peddlers, except of medicine &c., when traveling in vehicles."

A person selling ice in this manner is undoubtedly a peddler in the usual sense of the term. This specific ruling was made in Massachusetts.

Com. v. Reid, 175 Mass. 325.

A person selling ice in the manner above stated is, therefore, liable for a peddler's license. The express exemption of the small retail coal dealer from a coal dealers' license cannot operate to exempt an ice peddler from a peddler's license. The same reasoning may justify the legislature in

exempting both, but it does not authorize us to read into the law an exemption not contained in it.

Yours truly,
J. Q. SMITH,
Attorney General.

LICENSES; PLUMBERS:—A firm engaged in plumbing and doing business mostly by contract, is not liable for plumber's license but for contractor's license.

August 31, 1920.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Schedule 87 of the revenue law of 1919 reads as follows:

“For each person doing business as a master plumber, or steam fitter, or tin shops, in towns or cities of ten thousand or more inhabitants, twenty-five dollars, in all other places, ten dollars.”

Section 34 of the revenue law levies a license on contractors graduated according to the gross amount of orders or contracts.

You wish to be advised whether a firm or corporation, which is engaged in the plumbing business and does a large part of this business by contract, is liable for both of the above licenses.

In my opinion, the firm or corporation is liable for the contractor's license, under schedule 34, but is not liable for the plumber's license. The license levied by schedule 37 is on “a master plumber.” This license, like the one on lawyers and doctors, is levied only on natural persons. A corporation or partnership cannot be “a master plumber.” This license is, therefore, levied on each individual plumber.

Yours truly,
J. Q. SMITH,
Attorney General.

LICENSES; PUBLIC UTILITIES:—Railroads are not subject to payment of license under schedule 89 of revenue law of 1919.

August 31, 1920.

Hon, John S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Schedule 89 of the revenue law of 1919 levies a license on certain public utility companies in this language:

“For each person, firm or corporation operating a public utility, such as an electric light or power plant, street or interurban railroad operated by electricity or other motive power, water works, gas company, or heating company, or other public utility, *except telephone and telegraph companies, railroad and sleeping car companies, and express companies, which are otherwise licensed*, shall pay to the State a license tax equal to two mills on each dollar of the gross receipts of such public utility for the preceding year.”

You wish to be advised whether railroad companies are subject to a license under this schedule.

The statute expressly exempts railroad and other named public utility companies from the payment of this particular license. It is true that all the other named companies are actually “otherwise licensed,” but there is no other license on a railroad. The statement in the statute that it is “otherwise licensed” is, therefore, untrue. Possibly the legislature intended to levy such a license. However that may be, it certainly did not intend to levy this particular license on railroads, as they, with other named public utility companies, are expressly exempted from liability under this schedule.

It is evident from an inspection of this schedule that this license is intended to be levied only on those public utility companies which are located within the limits of a single county. The license is required to be paid “to the probate judge of the county where such public utility does business,” and only one license is required to be paid. A railroad certainly could not be compelled to take out a separate license in each county in which it did business; yet, one

county is as much entitled to the license as another. The machinery is utterly unsuited to the collection of any license from railroads.

Again, the license is levied on the entire gross receipts for the preceding year, without any separation of intra-state receipts from inter-state receipts. This would probably be an unwarranted burden on inter-state commerce, if levied on railroads in this manner. It is unnecessary, however, to express an opinion on this point. The statute in express terms and in its necessary effect exempts railroads from the payment of this particular license.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

TAXATION; CORPORATIONS:—A railroad company owning part of its own capital stock, which it had attempted to cancel but not in the mode prescribed by law, must include such stock in paying franchise tax.

September 1, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You state the following facts:

A corporation was organized under the laws of Alabama on January 21st, 1887, with a paid up capital stock of \$3,000,000. Early in the nineties the corporation adopted the policy of not paying cash dividends, but of using its earnings for the purchase of its own outstanding stock. The stock thus bought in was attempted to be canceled and retired, but without complying with the statutory provisions for that purpose. This method of stock buying and cancellation has continued to date.

You wish to be advised whether this corporation owes a franchise tax on its original paid up capital stock, or whether this tax is based on the amount now outstanding, after being reduced in the manner above stated.

Several opinions recently rendered by this office settle the principles which should govern you in this case. This

inquiry only presents another phase of the same question. I shall, therefore, state briefly the conclusions already reached by us and refer you to our recent letters for the reasoning on which these conclusions are based.

It is well to recall at the outset that prior to an act approved October 2nd, 1903, there was no statute in Alabama authorizing a corporation to reduce its capital stock. The purported reduction of the capital stock of this corporation which took place between the date of its incorporation—January 1887—and the date of the approval of this act—October, 1903—cannot, therefore, rest on a legislative permission.

The following principles of law are well settled:

First: "The cases are unanimous in holding that a corporation has no power to increase or diminish its capital stock unless expressly authorized to do so. No such power can be claimed by implication."

7 R. C. L., p. 202;

Heide v. Capital Securities Co., 200 Ala. 397;

Granger's Life Ins. Co. vs. Kamper, 73 Ala. 325;

Scovil v. Thayer, 105 U. S. 143.

Second: Any attempted increase or decrease of the capital stock of a corporation, without express authority therefor, is entirely void.

Authorities above cited.

Third: If the legislature has prescribed a method for increasing or decreasing capital stock, the statutory method must be followed. As said by Chief Justice Brickell in Granger's Life & Health Ins. Co. v. Kamper, supra:

"When a corporation relies upon a grant of power from the legislature to do an act, it is as much restricted to the mode prescribed by the statute for its exercise, as it is to the particular thing allowed to be done."

Fourth: Corporate inbuying of its own stock does not amount to a cancellation of said stock. Stock once issued is and remains outstanding until retired and canceled by the method provided by statute. The stock so purchased

becomes treasury stock, belongs to the corporation and may be sold as other assets of the corporation.

Knickerbocker Imp. Co., v. Board, 65 Atl. 913;
Walsh v. State, 74 Sou. 49;
Draper v. Blackwell, 138 Ala. 184;
14 C. J. p. 407;
Davis v. Montgomery Fur. Co., 101 Ala. 127;
Henderson v. Gerser, 200 Ala. 50;
7 R. C. L., p. 552.

It follows, therefore, that the corporation in question has still a paid up capital stock of \$3,000,000. It is immaterial that a part of this stock is now owned by the corporation. It is still paid up capital stock and is subject to a franchise tax.

Very truly,
HENRY P. WHITE,
Assistant Attorney General.

SCHOOL SYSTEM; COUNTY TREASURER:—No objection lies to augmenting school funds by accepting interest on daily balances.

September 2, 1920.

Hon. John W. Abercrombie,
Superintendent of Education,
Montgomery, Ala.

Dear Sir:

I herewith return letter from Hon. Wm. Cunningham to you, dated Aug. 25, 1920, and letter from Hon. Geo. M. Watson to you dated Aug. 30, 1920, which were left at this office by Mr. Gunnels of your office, with request for an opinion, as to whether it is lawful for the Marengo County Board of Education to receive $2\frac{1}{2}$ per cent on daily balances from the Treasurer of the county public school fund.

I can see no legal objection to such action, nor do I see any relevancy of section 6834 relating to embezzlement by using school money for other than school purposes or the case of Alston vs. State, 92 Ala. 124, referred to in Mr. Watson's letter.

If this $2\frac{1}{2}$ per cent were to be used for other than school purposes, that would, of course, be without legal justifica-

tion, but I can see no possible objection to augmenting the school fund to this extent.

Yours truly,
J. Q. SMITH,
Attorney General.

SOLICITOR'S FEES; MOBILE COUNTY:—All solicitors' fees earned in the circuit court should be paid into the State Treasury, and all solicitors' fees in inferior courts should be paid into the county treasury.

September 3, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 1st inst., with reference to the method of handling solicitor's fees earned in the Circuit Court of Mobile County.

You inquire where a circuit solicitor, as in Mobile County, is paid a salary by the State and there is no special local or general law providing a different method, should not all the solicitor's fees earned by him be paid by the clerk of the circuit court when collected, into the State treasury, even though in addition to the salary paid by the State he is paid an additional salary by the county; and you further inquire if there is any provision of law authorizing the payment of solicitor's fees earned in the circuit court of Mobile County, otherwise than into the State treasury?

Section 7792 of the Code of 1907 provides that all fees which may be by law taxed as solicitor's fees against defendants on convictions secured by a solicitor who is paid a salary by the State belong to the State and when collected must be paid into the State treasury.

In certain counties of the State the salary of the State solicitor is paid partly out of State funds and augmented by payments from the county treasuries. In such cases, however, the solicitor is paid a salary by the State, and I am of the opinion that all fees earned by him should be paid into the State treasury, and that it is immaterial that in

such counties the salary paid by the State to the circuit solicitor is augmented by payment out of county funds.

Acts of 1919, page 188, provides for the appointment of an assistant solicitor at a salary of \$2400 per year, payable out of the county treasury. By the provisions of this act such assistant solicitor is required to represent the State in all cases in the inferior courts and in all preliminary proceedings, applications for bail and habeas corpus proceedings, in all courts and to aid or act for the solicitor before the grand jury in all matters in the circuit court when requested to do so by the circuit solicitor, and to perform all duties in his absence, when so directed by the Circuit Solicitor.

The original act creating the office of assistant solicitor for Mobile County, Acts 1911, p. 17, provides for the payment of a salary of \$2400 per year out of the county treasury, providing that in each conviction in the inferior court of Mobile County and in the recorder's court of the City of Mobile or other courts of like jurisdiction, when the State is represented by such assistant solicitor, and in each conviction on appeal from said courts, there should be taxed against the defendant as a part of the costs, a solicitor's fee of \$3.00 which when collected should be paid over to the county treasurer of Mobile County, and by him deposited as a part of the general funds of said county. This act of 1911 also requires such assistant solicitor when requested by the solicitor to attend each term of the city court of Mobile County, and prosecute or aid and assist the solicitor in the prosecution of all cases in said court, and to perform any and all other duties required by law, as circuit, county or city solicitors, in the county, including attendance upon the grand jury in the place of the solicitor, in the performance of such duties, the assistant solicitor being authorized to exercise all authorities of the said solicitor of Mobile County.

It seems apparent from the 1911 act that it was contemplated that the assistant solicitor's salary should be paid out of county funds, but notwithstanding this he should render any service required of him in the circuit court or court of like jurisdiction, by the Solicitor of such court.

In addition to this, it is provided by section 7 Acts 1915, page 822, that for every conviction of a misdemeanor in

the county courts or inferior courts, there shall be taxed and collected as a part of the costs, and paid into the county treasuries the same solicitor's fees provided for conviction in such cases in the circuit court.

It therefore seems to me that it is apparent that it was intended by the legislature that all solicitor's fees earned in the circuit court should be covered into the State treasury, and all solicitor's fees earned in inferior courts should be paid into the county treasury, even though an assistant solicitor might be called upon by the circuit solicitor to perform a service in the circuit court which would result in the earning of a fee by such assistant or deputy solicitor. It appears to be the intention of the law that the solicitor is the official representing the State in the circuit court, although certain services may be performed by his subordinates, and that all fees earned in such cases shall be paid into the State treasury out of which all circuit solicitors in the State are paid wholly or in part.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

SHERIFFS; ACCOUNTING:—Under local act for Crenshaw county sheriff's fees for executing search warrants in cases where State fails to convict are paid from fund set aside from general fund.

September 3, 1920.

Hon. R. J. Jones,
Sheriff,
Luverne, Ala.

Dear Sir:

Your letter of the 19th ult. to the Governor with reference to your fees for services in serving search warrants where nothing is found in serving such warrants, was referred to the Attorney General for reply.

The Act of 1915 to which you refer provides that if the complaint be not sustained and no judgment of forfeiture is obtained, the costs shall be taxed and paid as costs are taxed and paid in criminal prosecutions wherein the State fails. Section 6889 of the Code of 1907 provides for the payment of officers' costs in cases in which defendants are not convicted.

As I construe the local act of 1919 to which you refer, however, your county is taken without the scope of section 6889 and your claim for fees should be handled in accordance with the provisions of the 1919 act. Section 5 of this act provides that the fees of sheriffs in cases where the State fails to convict shall be registered against the fine and forfeiture fund, and on the first day of January following, shall be transferred to the general fund. I construe this to mean that such fees shall be paid out of the \$2000 set aside from the general fund of the county under the provisions of section 1 of the act.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

LICENSES; BILL BOARDS:—Advertising companies and advertiser both where liable for license for use of bill boards under the 1915 law, but under the 1919 law only the advertising company is subject to such license.

September 9, 1920.

Hon. Ben P. Hunt,
Huntsville, Ala.

Dear Sir:

I beg to acknowledge receipt of your letter of September 3rd with reference to license for persons using bill boards.

I beg to advise that under Schedule 18 of Section 361, revenue law of 1919, a license is exacted from "all advertising companies displaying advertisements in public places, including streets." The license law of 1915 (Acts 1915, page 495) apparently required a license both from the owner of the bill board or wall space and the person displaying the advertisements. The law of 1919 in express terms exacts a license only from the advertising company. Consequently, Orgain and Phillips, under the state of facts shown in the attached letter, are not subject to the bill poster's license for 1920, but would be subject to license for the years 1915 to 1919 inclusive.

Very truly,
J. Q. SMITH,
Attorney General.

SOLICITOR'S FEES; MOBILE COUNTY:—Solicitor's fees are same in county court and inferior courts as in circuit court.

Hon. Bart B. Chamberlain,
Solicitor,
Mobile, Ala.

September 9, 1920.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 8th instant.

The Act of 1911, Local Acts 1911, page 17, provides for a Solicitor's fee of \$3.00.

The latter part of Section 6, Acts 1915, p. 822, provides that the 1911 Act is not altered or changed by the 1915 Act. So, in my judgment, it was proper under the 1915 Act to continue to tax the Solicitor's fee at \$3.00, until the Act of 1919, Acts 1919, p. 188, became a law. It repealed the 1911 statute.

The Act of 1911 was referred to in my letter to Judge McCall merely for the purpose of showing the intention that the Assistant Solicitor should aid the Circuit Solicitor, although the salary of the Assistant Solicitor was paid out of the County Treasury.

Since the 1919 Act repealed the 1911 Act, I am of the opinion that Section 7 of the 1915 Act, providing that for every misdemeanor in the County Court or Inferior Courts the same Solicitors' fees should be taxed and collected as a part of the costs and paid into the County Treasury as is provided for convictions in such cases in the Circuit Court, is controlling.

It will be noted that the latter part of Section 6 of the 1915 Act referred to provides that \$1,200.00 of the salary of the Assistant Solicitor should be paid by the State. That is, however, changed by Section 2 of the 1919 Act which provides for payment of the entire salary of the Assistant Solicitor out of the County Treasury.

As stated above, I am of the opinion that Solicitors' fees in the Inferior Courts of Mobile should be taxed as Solicitors' fees are taxed in such cases in the Circuit Court, and that the provisions of the 1911 Act providing for a Solicitor's fee of \$3.00 is no longer effective, the 1911 Act having been expressly repealed by Section 5 of the 1919 Act.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

BOARD OF CONTROL AND ECONOMY; PRINTING AND BINDING:—A maximum price may be fixed by the Board of Control and Economy in the circular inviting bids, which price must not be greater than the maximum rate fixed by statute for printing and binding acts and journals.

September 11, 1920.

Hon. C. B. Rogers, Chairman,
Board of Control and Economy,
Capitol.

Dear Sir:

The Attorney General's office replies to your letter of the 10th inst., with reference to maximum prices to be paid for printing and binding. In my judgment, the Act approved February 18, 1919, is not repealed by the Act of September 30, 1919, both referred to in your letter. The latter Act provides that, "No bid in excess of a maximum price or rate, to be fixed by the Board of Control and Economy in the circular inviting bids, shall be considered."

This provision is, however, in my opinion, subject to the provision in the former Act that, "The maximum price per page shall be three dollars and the maximum for binding the acts and journals shall be sixty cents per copy."

I am of the opinion that the bids may provide for a smaller amount for such printing and binding but not for an amount larger than such maximum.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

STATE HIGHWAY DEPARTMENT; BOARD OF CONTROL AND ECONOMY; CONTRACTS:—All contracts made for purposes referred to in section 69 of Constitution must be first approved by the Governor, the State Auditor, and the State Treasurer.

September 11, 1920.

Hon. C. B. Rogers, Chairman,
Board of Control and Economy,
Capitol.

Dear Sir:

The Attorney General's office replies to your letter of the 10th instant, with reference to contracts made by the State Highway Department.

Section 69 of the Constitution cannot be changed by any Act of the Legislature, regardless of what Department of State such Act may relate to, and any contracts made for any of the purposes referred to in said Section 69 are "subject to the approval of Governor, Auditor and Treasurer," as provided in said Section. No contract made by any Department for any of the purposes referred to in Section 69 can be binding upon the State unless the same shall have first been approved by the Governor, Auditor and Treasurer.

Yours truly,
J. Q. SMITH,
Attorney General.

REGISTER'S FEES; TRANSCRIPTS:—If appellant fails in his appeal the sureties for costs are liable for transcript fees, but if the appellant succeeds, the sureties are not liable for such fees.

September 11, 1920.

Hon. C. F. Rankin,
Register in Chancery,
Brewton, Ala.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 4th inst., concerning costs of making transcript for appeal.

Section 2872 of the Code provides for giving security for costs in cases in which appellant does not desire to supersede the judgment or decree and provides that execution may issue against the sureties for the costs in the Appellate Court, "and the cost of the transcript, if decided against the appellant."

Section 2873 of the Code provides for a bond in cases in which appellant desires to supersede a judgment or decree, "in double the amount of the judgment or decree, including costs, payable to the appellee, with sufficient sureties, and with condition to prosecute the appeal to effect, or if he fails therein, to satisfy such judgment as the Supreme Court may render in the premises."

In such case, I am of the opinion that the bond covers all costs, so that if appellant should lose on the appeal the

bond would cover all costs in the lower court, including costs of the transcript, also such costs as might be incurred in the Appellate Court.

I do not think the cost of preparing the transcript is a part of the cost of appeal, costs of appeal being costs incurred in the Appellate Court. I do think, however, the sureties for costs or the bondsmen, as the case may be, are liable on their bond for the costs of the transcript in the event appellant fails on his appeal. I am also of the opinion that the appellant would be liable for the transcript fees in the event he wins on appeal and such costs cannot be made out of appellee; as a party to a suit is liable for costs incurred at his instance in cases won and such costs cannot be made out of the losing party by execution. The sureties on a bond are not liable for transcript fees, however, if the appellant succeeds on appeal, transcript fees in such cases being recoverable against the appellant only.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

UNITED STATES GOVERNMENT RESERVATION; TAXATION; LICENSES:—Property and business of private individuals carried on within government reservation are subject to state taxation and license.

September 11, 1920.

Hon: Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You wish to be advised whether the property and business of private individuals are exempt from ad valorem and license taxation, solely because said property or said business is located or carried on in a United States Government reservation in Alabama. The two particular reservations to which your inquiry is directed are the Nitrate Plant No. 2, and the Wilson Dam Site. On both of these reservations private individuals operate picture shows and other businesses subject to a State license, the United States Government itself having no pecuniary interest in the business except the rental it receives from the private proprie-

tor. Is the property used in the business and the business itself, so located and so carried on, subject to taxation in Alabama?

The pertinent provision of the Federal Constitution reads as follows:

"The Congress shall have power: * * * To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

It is provided by sections 898 and 899 of the Code of Alabama as follows:

"898. The State of Alabama has ceded to the United States of America jurisdiction over all lands which have been or may hereafter be purchased by the United States in the State of Alabama, for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy yard, custom house, light house, postoffice, or public building of any kind whatever; and the legislature of the State of Alabama has consented to all such purchases by said United States of America."

"899. The jurisdiction ceded shall continue during the term the United States of America shall remain owner of the land so purchased, and shall be exclusive for all purposes except that service of process out of the courts of the State of Alabama shall not be prevented therein."

Our Supreme Court in *Webb vs. J. G. White Engineering Corporation*, in MS., held that the land acquired for Nitrate Plant No. 2 was purchased, with the consent of the legislature of Alabama, for one of the purposes mentioned in the above provision of the Federal Constitution, and that the State of Alabama has ceded jurisdiction to the United States Government over all lands so purchased

in the manner contemplated by the constitution. The property and business located and carried on on the lands of the Nitrate Corporation therefore present the strongest claim to exemption from ad valorem and license taxation. Any conclusion affirmative to the right of state taxation in this case will include the affirmance of the same right as to persons and property on the Wilson Dam Site.

The question presented is a federal question and, until definitely settled by the Supreme Court of the United States, we cannot be certain of the correctness of any conclusion reached by us.

The jurisdiction given the federal government by the Constitution and by the provisions of our State statutes are in express terms exclusive of any other jurisdiction, except only that the State reserves the right to serve process out of its own courts on said territory.

"The reservation which has usually accompanied the consent of the states that civil and criminal process of the State courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice."

Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 533.

In the last cited case the railroad company, located on the military reservation of Ft. Leavenworth, claimed immunity from State taxation on the ground that the federal government had exclusive legislative power over said territory. This territory belonged to the federal government prior to the admission of Kansas as a state and it was not, therefore, acquired by purchase, with the consent of the state. The State of Kansas subsequent to its admission ceded jurisdiction over said territory, but expressly reserved the right to tax the railroad located on said military reservation. The Supreme Court held that, as said territory was not acquired in the manner provided for in the Constitution, the federal government did not possess exclusive legislative power over said territory; and that the State of Kansas could prescribe such conditions to the cession as were not inconsistent with the effective use of the property

for the purposes intended. The same holding was made in *Chicago & Pacific Ry. v. McGlinn*, 114 U. S. 542.

These two cases and other decisions cited in *Webb v. J. G. White Engineering Co.*, *supra*, seem to support the conclusion that, where land is acquired by the federal government in the manner and for the purpose mentioned in the constitution, Congress exercises exclusive legislative power over such land. This particular question was not, however, presented in any of the cases. The right of Congress to *exercise exclusive* legislative power may be admitted, but, where it fails to exercise such power with respect to taxation, or where it does not expressly forbid state taxation of private property and private individuals, there is no conflict of jurisdiction between the two sovereignties.

In *Thompson v. Union Pacific R. R. Co.*, 19 L. Ed. 798, the Court said:

"No one questions that the power to tax all property, business and persons, within their respective limits, is original in the states and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operation of the National Government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection."

United States v. Canyon County, Idaho, 232 Fed. Rep. 985, quoting from opinion:

"Generally speaking, one who has the right to property and is not excluded from its use and enjoyment should not be permitted to use the legal title of the government to avoid his just share of taxation."

Baltimore Ship Bldg. Co. v. Baltimore, 195 U. S. 382, from opinion by Justice Holmes:

"But, furthermore, it seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person, or its property, because it is

employed by the United States, even if the work for which it is employed is important and takes much of its time."

Maish v. Arizona, 164 U. S. 609, from opinion:

"It has been held that possessory rights founded upon mere occupation and improvements upon government land, though invalid as against the government, may be made the subject of barter and sale, and may be treated under the laws of the State and Territory as having all the attributes of property."

U. S. v. Moses, 185 Fed. Rep. 90 holds as follows:

1. Property of a contractor with the United States government, which, on the default of the contractor, an officer has taken for use in completing the contract, is not exempt from taxation, in the absence of an act of Congress to that effect; the government having no ownership therein.

2. The mere fact that Walter was an officer of the United States, and claimed that his possession of the property was for and on behalf of the United States, did not prevent its seizure by the sheriff for taxes assessed against it.

Moore v. Beason, County Treasurer, 7 Wyo. 292.

Headnote:

"Cattle and horses owned by a licensed Indian trader, and kept and grazed upon the Indian reservation, with the consent of the Indians who are paid for the privilege, are subject to State taxation."

Noble v. Amaretti, 11 Wyo. 230:

Headnote 3. "State taxation of the stock of goods of a licensed Indian trader located upon an Indian Reservation is not a tax or burden upon commerce with an Indian tribe; and such taxation is not invalid as a regulation of commerce with Indian tribes."

Headnote 4. Such property "is subject to taxation under the laws of the State in the same manner and to the same extent as all other like property within the county."

The decisions in *Commonwealth v. Clary*, 8 Mass. 72 (rendered in 1809) and in *Moline Water Power Co. v. Cox*, 252 Ill. 348 (rendered in 1911) hold that State taxation laws have no application to places over which Congress has the exclusive power of legislation in all matters.

The question submitted is not free from doubt and, until definitely determined by the Supreme Court of the United States, it must be considered an open question. I am convinced, though, that, unless Congress expressly prohibits State taxation, the State taxation laws can still be enforced against private property and private business located and carried on on the Nitrate Corporation lands. The like property and business located on the Wilson Dam Site are for even stronger reasons subject to State taxation.

Very truly yours,
HENRY P. WHITE,
Assistant Attorney General.

STATE PRISON INSPECTOR:—May direct removal of prisoners from city jail of a city of more than 10,000 population, to county jail in same county.

September 13, 1920.

Dr. Glenn Andrews,
State Prison Inspector,
Capitol.

Dear Sir:

The Attorney General's office is in receipt of your letter of the 13th inst., making inquiry as to whether you have authority to direct the removal of a prisoner from a city jail to the county jail of the same county under conditions mentioned in your letter.

By the provisions of this Act jurisdiction is conferred upon you over such town and city prisons as are in towns or cities of ten thousand or more population according to the last federal census prior to the approval of the Act on April 8, 1911, page 356.

Section 14 of the Act to which you refer in your letter, provides that in certain cases mentioned in this section, "the said inspector may order any and all persons confined in such jail, prison, or almshouse immediately transferred

to the jail, prison or almshouse of some other county, to be designated by the inspector," etc.

I am of the opinion that it was the purpose of this section to provide for the removal of prisoners from one county to another in the event the inspector should consider the prisons in the county where such prisoners are confined improper, inadequate, etc.; and not to require removal outside of the county unless the prisons in such county are considered by such inspector to be improper, inadequate, etc.

I am therefore of the opinion that you have authority to direct the removal of prisoners from a city prison to the county jail of the same county in cases deemed advisable by you; provided, of course, that such city prison be in a city or town of the required number of inhabitants, as referred to above.

Yours truly,
J. Q. SMITH,
Attorney General.

PROHIBITION LAWS; SOLICITOR'S FEES:—Where no special provision is made for solicitor's fees, the general provision of \$10.00 governs.

September 13, 1920.

Hon. B. T. Roberts,
Judge of Probate,
Clayton, Ala.

Dear Sir:

I have your letter of the 19th inst. with reference to solicitor's fees in cases for having in possession prohibited liquors.

I am of the opinion that the conclusion reached in your letter is correct. There appears to be no special provision for a solicitor's fee in such cases, and in my opinion the general provision for a fee of \$10.00 in misdemeanor cases not otherwise provided for governs.

Yours truly,
J. Q. SMITH,
Attorney General.

TAXATION; MERCHANDISE:—Automobiles should be assessed by dealers for ad valorem taxation as merchandise.

September 14, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You wish to be advised whether a dealer in automobiles is a merchant in such sense that the stock of automobiles carried by him can be assessed as "merchandise," under subdivision "d," section 5 of the revenue law of 1919. This subdivision levies the usual ad valorem tax on "all stocks of goods, wares and merchandise, the assessment to be on the average amount on hand during the preceding year, but the amount so assessed shall in no case be less than the capital actually employed in the business."

We have previously advised you that "live stock" is not "merchandise" within the accepted meaning of the term. *Jewell v. Board of Trustees*, 113 Iowa, 51; and that our statute, in enumerating the separate items of taxable property, had indicated an intent to treat "live stock" as separate and distinct from "merchandise."

The same construction of our taxation statute cannot apply to "automobiles." A dealer in automobiles is as much a "merchant" as a dealer in wagons.

Wynne v. Eastman, 105 Ga. 617, from opinion:

"Carriages, wagons and other vehicles are embraced within the ordinary meaning of the term 'merchandise'."

Mara v. Branch, (Texas), 135 S. W. 662, from opinion:

"'Merchandise' is a term of very extended meaning, and usually conveys the idea of personalty used by merchants in the course of trade. It may as a fact include every article of traffic."

Kohlsaatt v. O'Connell, 255 Ill. 273:

"Webster's New International Dictionary gives as one of the definitions of 'mercantile,' 'having to do

with, or engaged in, trade, or the buying and selling of commodities'. The Standard Dictionary defines 'merchandise' as 'anything movable, customarily bought and sold for profit'."

City of Gulfport v. Stratakos, (Miss.) 43 Sou. Rep. 812:

"Fruit is merchandise within the meaning of the statute under consideration. In the case of Blackwood v. Cutting Packing Co., 76 California, 214, it is said: 'The plaintiff contends, in the first place, that apricots are not merchandise. A walk through the markets would probably convince him that he is mistaken. It is said, however, that such fruit comes under the head of "produce." Very likely it does. But we think that the word "merchandise" covers all kinds of personal property which is ordinarily bought and sold'."

See also:

Rohlf v. Kasemeier, 140 Iowa, 182;
Peoples Sav. Bank v. Van Allsburg, 165 Mich. 524;
Pickett v. State, 60 Ala. 77.

In line with the reasoning in the Blackwood case, *supra*, we can well say that a walk through the business district of any city will convince anyone that automobiles constitute a staple stock in trade. It is a matter of common knowledge that they are offered for sale now and sold quite as frequently as buggies and surreys used to be sold. They are, it is true, an innovation and improvement over the old time "vehicles." They are none the less "vehicles."

Our opinion, therefore, is that an automobile dealer is a "merchant" and that his stock in trade should be taxed as other "merchandise."

Very truly yours,

HENRY P. WHITE,
Assistant Attorney General.

PROHIBITION LAW; LICENSES:—Sale of cider cannot be licensed.

September 14, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Schedule 24 of Revenue Law of 1913 levies the following
license:

“For every person selling at retail, etc., drinks
known as ciders, or any similar drink,—fifty dollars.”

This schedule is brought down from the Act of 1907, at
which time intoxicating liquors were legally sold in Ala-
bama.

“Where the law prohibits or regulates the sale of
cider by name, without any qualifying word, it applies
to all cider without regard to its intoxicating qualities.”
Commonwealth v. Goodwin, 109 Va. 828.

The language used in the above schedule must, therefore,
be construed as including “hard cider” as well as fresh
apple juice. So construed, it comes clearly in conflict with
our prohibition laws.

“Any liquor, drink or liquid made or used for bev-
erage purposes, containing any alcohol, shall be deem-
ed an alcoholic liquor, within the meaning of the term
‘prohibited liquors and beverages’ as defined in this
act.” Acts 1919, p. 7.

While fresh apple juice contains no alcohol, it is a mat-
ter of common knowledge that fermentation soon sets in
and alcohol accumulates in it. It is always potentially an
alcoholic drink, becoming such by its own unaided action.
For the reason above given, the sale of cider or any similar
drink cannot legally be licensed in Alabama. Schedule 24
has, therefore, now no field for operation.

It has been said:

“In strictness the juice of the apple before fermen-
tation is simply apple juice, and it is only by fermen-

tation that it becomes cider." Eureka, Vinegar Co. v. Gazette Printing Co., 35 Fed. 570.

To same effect see:

State v. Schaefer, 44 Kansas, 90;
Pikeville v. Huffman, 112 Ky. 360.

Perhaps the weight of authority is that the term cider includes both fresh apple juice and hard cider.

State v. Frederickson, 101 Mo. 37;
Commonwealth v. Goodwin, 109 Va. 828;
State v. Spalding, 61 Vt. 505;
Commonwealth v. Dean, 80 Mass. 99;
Feldman v. Morrison, 1 Ill. App. 460.

But, whether the term "cider" includes only the fermented drink, or whether it includes both the fermented and unfermented beverage, the licensing of its sale is offensive to our prohibition law.

Yours truly,
J. Q. SMITH,
Attorney General.

CONVICTS:—Short time may not be allowed on hard labor sentence given for costs.

September 15, 1920.

Mr. W. F. Feagin,
State Warden General,
Capitol.

Dear Sir:

You have referred to this office certain papers in connection with the release of George Curran, who was sentenced to six months' hard labor, a fine of \$25.00, and costs amounting to \$22.80. The fine and costs were not paid.

Under section 7514, when the sentence is for less than two years and *not less than* six months, the convict may be allowed a pro rata deduction of the time allowed for the first two years.

As to costs, the statutes make no provision for remitting any part of the time to be served for costs. Under section

7510, the Governor is given power to grant reprieves, commutations, paroles, and pardons, and to remit fines and forfeitures. This section confers no power to remit costs.

Section 7514 places the good behavior allowance within the Governor's discretion, but does not give him any broader power than was conferred by section 7510. The provision in section 7514 reads: "The governor may, in his discretion, order a portion of the sentence of such convict to be deducted for each year of good conduct." Criminal statutes being strictly construed, it is not possible to assume that the "sentence" includes the costs.

Very truly,
J. Q. SMITH,
Attorney General.

SCHOOL SYSTEM; COUNTY EXPENSE:—School registers required to be kept by teachers under the orders of the county board of education should be paid for by the county.

September 18, 1920.

Hon. John W. Abercrombie,
Superintendent of Education,
Capitol.

Dear Sir:

You wished to be advised whether the school registers, required to be kept by the school teachers, under orders of the State and County Boards of Education, should be paid for by the county or State.

Section 23, Article 5, of the general education act of 1919, provides:

"Section 23. The county board of education, subject to the provisions of this act, shall prescribe, upon the recommendation of the county superintendent of education, forms and blanks on which school trustees, supervisors, attendance officers, principals, teachers, janitors and other regular employees shall make such reports as shall be required from them by the county board of education."

Section 17, Article 6, of said act provides:

"Section 17. The county superintendent of education, subject to provisions of this act, shall prepare

forms and blanks on which school trustees, supervisors, attendance officers, principals, teachers, janitors and other regular employees shall make such reports as shall be required by the county board of education, and shall submit the same for approval and adoption by the county board of education."

Section 20, Article 6 of said act, provides in part as follows:

"The county board of revenue or court of county commissioners shall also provide necessary furniture, office equipment, stationery, postage, forms and supplies required by the county superintendent of education and his assistant."

Section 11, Article 3, of said act, provides that the forms and blanks prescribed by the State Board of Education for the use of county boards of education, school officials, and teachers, shall be paid for by the State.

Section 16, Article 4, of said Act, requires the State Superintendent of Education to prepare and submit for approval and adoption by the State Board of Education a uniform series of forms and blanks for the use of the county boards of education, school officials and teachers.

The above sections clearly indicate that there are forms and blanks, prescribed by the State Board of Education, which must be paid for by the State; and that there are also forms and blanks, prescribed by the county boards of Education, which should be paid for by the county. The line of demarkation does not plainly appear, but I am convinced that all forms, blanks and records which are used *locally* and for the purpose of making proper reports to the county superintendent of education or to the county board of education, if such forms, etc., have been adopted by the county board of education, are a part of the "forms and supplies required by the county superintendent of education."

I am of the opinion, therefore, that a school register required to be kept by school teachers, under an order of the county board of education, should be paid for by the

county as provided by section 20, of Article 6, of the general educational bill.

Yours truly,
J. Q. SMITH,
Attorney General.

SCHOOL SYSTEM; SCHOOL DISTRICTS:—A new tax district is a new school district. Schools may be consolidated in the new district.

September 18, 1920.

Hon. John W. Abercrombie,
Superintendent of Education,
Capitol.

Dear Sir:

You wish to be advised whether the creation of a special tax district, for the purpose of levying a local school tax, constitutes a new school district for all purposes. The specific inquiry is whether the newly created tax district, composed in part of two separate school districts, now constitutes a new school district so that two or more schools located in the new district, but originally located in separate school districts, can now be consolidated without the consent of the trustees of the original school district.

Section 10, Article 5, of the general educational law, provides:

“Section 10. The county board of education shall consolidate schools whenever in its judgment it is practicable, and arrange, if possible, for the transportation of pupils to and from such consolidated schools. But no school shall be consolidated, by consolidating two or more separate schools located in separate school districts, without consent of said separate district trustees.”

Section 4, Article 12, of said educational bill, authorizes:

“The county board of education of its own initiative to fix the boundaries of any school district within its jurisdiction in which it is proposed to levy a local school tax.”

This section provides

“that the levy of the district school tax shall operate to fix the boundaries of such district for the time of such special levy, except as hereinafter provided.”

The subsequent provision here referred to is found in section 5 of this same article, which permits the enlargement of any special tax district by consolidating with it any adjacent territory or district.

Article 19, Section 2, of our Constitution, provides in part as follows:

“The several school districts of any county in the State shall have power to levy and collect a special district tax not exceeding thirty cents on each one hundred dollars worth of taxable property in such district for school purposes; provided, that a school district under the meaning of this section shall include incorporated cities or towns, or any school district of which an incorporated city or town is a part, or such other school districts now existing or hereafter formed, as may be approved by the county board of education.”

The above constitutional provision, which is the fundamental authority for the levy of a local school tax, shows clearly that the special tax is levied in and for a school district. A tax district is, therefore, a school district. The creation of a tax district, under the authority conferred by the educational bill, is the creation of a new school district. Schools in the new school district can be consolidated by the county board of education, without the consent of the original school district trustees. The fact that the schools proposed to be consolidated were formerly located in separate school districts is beside the point. These schools are now in one and the same school district.

Yours truly,

HENRY P. WHITE,
Assistant Attorney General.

REGISTRATION AND ELECTIONS; POLL TAX:—Women who registered after passage of Federal amendment in counties where books were open were entitled to vote before passage of enabling acts by the State Legislature. Poll taxes of women voters not delinquent until Feb. 1, 1921.

September 18, 1920.

Hon. Palmer Pillans,
Attorney for Board of School Commissioners
of Mobile County,
Mobile, Alabama.

My dear Sir:

You request the opinion of this office relative to the following:

Special elections have been called in the different school districts of Mobile county to be held September 24, 1920, to determine in each district whether a tax of thirty cents on each one hundred dollars of taxable property within said district shall be levied for school purposes within said district.

Will the women who have registered in Mobile county, without an enabling act by the legislature, be entitled to vote and participate in such election?

The provisions of our State Constitution and statutes limiting the right to vote to males were annulled by the adoption of the Federal Constitutional Suffrage Amendment, and females, immediately upon its adoption, if otherwise qualified, became vested with the right to exercise the election franchise with the same freedom as men.

Ex parte Yarbrough, 110 U. S. 651.

Neal v. Delaware, 103 U. S. 370.

Anthony v. Holderman, 7 Kan. 50.

Under the present laws of this State, a certificate of registration is prima facie evidence that a person has every qualification necessary to entitle them to vote, except the payment of poll tax. A woman cannot be in default for the payment of poll tax (even though it be contended that the adoption of the Federal Amendment made her liable therefor under our Constitution) until the 1st day of February, 1921.

Const. 1901, sec. 194.

Acts 1915, p. 245, sec. 21.

It is my opinion, therefore, that no enabling act by the Legislature is necessary to entitle women to vote, and that those now registered may vote and participate in any election, to the same extent as, and subject only to the same restrictions imposed on men.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

CONVICTS:—Short time should be computed separately on two sentences and not on the sum of the terms. Short time cannot be given on the additional sentence for costs.

September 20, 1920.

Hon Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

I am in receipt of your letter of September 18th, making the following inquiries:

1. Should short time for good conduct be computed separately on two sentences of imprisonment in the penitentiary, or should the two sentences be added and short time computed on the sum of the two terms
2. When a convict is sentenced to hard labor for the county and an additional sentence to pay the costs, may he be given short time on the additional sentence to pay the costs in the case?

In reply to the first inquiry, I beg to say that sections 7510 and 7514, the two Code sections that confer power on the Governor to pardon, parole, and commute, cannot be extended to grant any powers not expressly therein conferred. If the intention had been to allow short time on the sum of the successive terms, words to that effect would have been inserted. The expression used in section 7514 is:

“The Governor may, in his discretion, order a portion of *the sentence* of such convict to be deducted for each year of good conduct.”

As pointed out by the Supreme Court of California with reference to a similar provision, while the "entire term" would include all sentences imposed at the same time, the legislature in changing the statute to read merely "term" limited the meaning to the natural one, that each sentence should stand separately; and that where the second sentence is to commence at the expiration of the first, each term is to be considered by itself as regards the allowance of credits for good behavior. (Ex parte Clifton, 78 Pac. 655, 145 Cal. 186.)

In reply to your second inquiry, no authority is conferred upon the Governor to remit costs or sentences for costs.

You will note that under this view of the law, no short time is due unless the sentence is for six months or more; that is, that there is no allowance for the sum of two or more terms aggregating more than six months where each of the separate terms is less than six months.

Trusting that this fully answers your inquiries, I am,

Very truly,

J. Q. SMITH,

Attorney General.

SOLICITOR'S FEES; PIKE COUNTY; LEGISLATION:—Solicitor's fees cannot be diverted from the State treasury by a local act for Pike county which does not cover such diversion in its title.

September 21, 1920.

Hon Chas. E. McCall,

Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

The Legislature of 1919 passed a local law, entitled "An Act to regulate the fine and forfeiture fund of Pike County, Alabama, and provide for the registration and payment of claims against said fund." See Local Acts, 1919, page 138. Section 4 of this act provides that "all moneys collected as fines or forfeitures * * * * and all moneys collected by the clerk of the circuit or county court, sheriff or other officer of said county, on account of witness fees or solicitors' fees in State cases, shall be paid into and constitute the fine and forfeiture fund of said county."

Your inquiry is: Must the circuit clerk of Pike county continue to pay solicitors' fees to the State treasurer, as required by Sections 7792 and 7798 of the Code of 1907; or must he now pay such fees into the fine and forfeiture fund of that county, as provided by the above act?

The answer to this inquiry depends upon the validity of the above quoted section of the local law.

Section 45 of our Constitution requires the subject of each law to be "clearly expressed in its title." An Act "to regulate the fine and forfeiture fund" of a county does not even suggest a disposition of moneys which constitute no part of that fund.

In *Sanders v. Commissioner's Court*, 117 Ala. 546, where an act with an almost identical title was construed, the court says:

"In ascertaining the extent and scope of this title, it becomes necessary to determine what constitutes the fine and forfeiture fund of a county. In the case of *Brown v. Parris*, 93 Ala. 314, it was said: 'The fund designated in the statute as the 'fine and forfeiture fund' is composed of fines and forfeitures arising from criminal prosecutions, or penalties for contempt of court, and primarily belongs to the State. It is a special fund set apart and devoted by law to special use—payment of the fees of state witnesses, and of officers of the court, accruing in criminal cases in specified contingencies. * * * * *'"

"No reasonable construction of the title of an act to regulate the fine and forfeiture fund would admit of the conclusion that such a title contemplated an appropriation of the general funds of a county."

Certainly, "no reasonable construction" of a similar title "would admit of the conclusion that such a title contemplated" a diversion of the general funds of the State into the fine and forfeiture fund of the county. The title indicates in general language a regulation of the "fine and forfeiture fund of the county." It does not even by inference intimate a regulation of any other fund.

I have no doubt that the provision in Section 4 of the above act, which attempts to divert the solicitors' fees from the State treasury, is unconstitutional and void.

See also:

State v. Smith, 187 Ala. 411;
Ryan v. Collins, 196 Ala. 481;
Mobile County v. State, 163 Ala. 441;
State v. Miller, 158 Ala. 59.

It follows, therefore, that the Solicitor's fees accruing in Pike County should still be paid to the State treasurer as required by the Code.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

ALABAMA MEMORIAL ASSOCIATION; ACCOUNTING:—Balance of appropriation for Alabama Memorial Association which was unexpended on Sept. 30, 1919, should not revert to the State Treasury.

September 21, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

My dear Sir:

I beg to acknowledge receipt of your letter of September 20th, in which you ask to be advised as to whether or not the appropriation of \$10,000 which is provided for in section 4 of an Act of the legislature of 1919, approved February 3, 1919, "To create the Alabama Memorial Commission, to prescribe its powers and duties, and to make an appropriation therefor," has reverted to the general fund in the treasury on September 30, 1919, as provided in section 55 of the General Appropriation Bill for the executive, legislative, and judicial departments of the State.

I beg to advise that in my opinion the appropriation made in the act creating the Alabama Memorial Commission is a continuing appropriation, and that the balance unexpended on September 30, 1919, does not revert to the general funds. The appropriation is for the purpose of carrying on a campaign to raise subscriptions and contributions for the erection of a Memorial Building, and the

appropriation of \$10,000 is to pay the expense thereof. This work may extend over a period of several years.

In my opinion, section 55 of the General Appropriation Act applies to annual appropriations for the several executive, judicial and legislative departments of the State, and in no wise conflicts with the appropriation made in the act creating the Memorial Commission.

Very truly,
J. Q. SMITH,
Attorney General.

PROBATE JUDGES; ROAD INSPECTION:—County commissioners may make an allowance to the probate judge for inspecting roads, but such allowance, together with other allowances for ex-officio services, must not exceed \$400.

September 25, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

You state that the Commissioners Court of Colbert county, in the exercise of the authority conferred on it by the General Road Law of 1915 (Acts 1915, p. 573), has imposed on the Probate Judge certain duties as to collecting, receiving and accounting for the road tax levied by the county. The Commissioners Court wishes to compensate the Probate Judge for the performance of these additional duties, and you desire to be advised whether the Commissioners Court can legally make an additional allowance for this purpose.

Section 3720 of the Code of 1907, as amended by the Acts of 1911, page 154, which fixes the fees and allowances of probate judges contains the following, among other provisions:

1. "Discharging his duties in relation to public roads, on proof to the county commissioners that he had discharged such duties, annually, to be paid out of the county treasury, not exceeding \$400.00; provided that this shall not apply to any probate judge who receives net annual compensation from his office exceeding five thousand dollars."

2. "All other official duties, for the compensation of which no express provision is made by law, such sum as may be allowed by the court of county commissioners, to be paid out of the county treasury, not exceeding, per annum, \$400.00."

In *Macon county v. Abercrombie*, Probate Judge, 184 Ala. 283, our Supreme Court held that the above two items come clearly within the definition of "ex officio services," as that term is used in Section 68 of our Constitution; and that, consequently, the legislature could increase such allowance so that a probate judge now holding office may immediately receive the benefit of such increase.

It appears from your inquiry that the additional duties imposed on the probate judge are in relation to public roads. This, it is true, is an ex officio service, but the statute sets a maximum compensation of \$400.00 per annum. All duties discharged by the probate judge in relation to public roads may be compensated for out of the county treasury, but the total annual allowance for such services cannot exceed \$400.00.

"All other official duties, for the compensation of which no express provision is made by law," may also be compensated for out of the county treasury. The total annual allowance for such services cannot exceed \$400.00. The extra duty, for the performance of which Colbert county proposes to allow additional compensation to the probate judge, is not included in the "ex officio services" intended by this particular provision of the statute. Very probably, the Probate Judge of Colbert County is already receiving the full four hundred dollars allowed for "all other official duties." But, whether he is or not, the statute having made specific provision for compensating him for his ex officio services "in relation to public roads," it follows by necessary inference that the other provision as to "other official duties" refers to duties *not* "in relation to public roads." Each provision has a field for operation and one does not include or embrace the other.

For the performance of any and all duties in relation to public roads, the county may make an annual allowance to the probate judge not exceeding four hundred dollars. If the probate judge is already receiving this amount, the

county cannot legally pay him an additional amount for the performance of any additional duties in relation to public roads.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

GENERAL STATEMENT

**SHOWING CHARACTER AND RESULTS OF PROSECUTIONS
IN EACH JUDICIAL CIRCUIT FOR TWO
YEARS ENDING SEPTEMBER 30, 1920**



The following comparative statement is submitted for the purpose of showing the history and volume of criminal appeals to the higher courts:

CRIMINAL APPEALS TO THE SUPREME COURT
FROM 1885 TO DATE.

- In 1885-86, 148 appeals, 90 affirmed or dismissed, 58 reversed. Percentage of reversals, 39.
- In 1887-88, 117 appeals, 72 affirmed or dismissed, 45 reversed. Percentage of reversals, 38.
- In 1889-90, 189 appeals, 110 affirmed or dismissed, 79 reversed. Percentage of reversals, 42.
- In 1891-92, 185 appeals, 112 affirmed or dismissed, 73 reversed. Percentage of reversals, 39.
- In 1893-94, 230 appeals, 124 affirmed or dismissed, 106 reversed. Percentage of reversals, 46.
- In 1895-96, 263 appeals, 158 affirmed or dismissed, 105 reversed. Percentage of reversals, 46.
- In 1897-98, 231 appeals, 150 affirmed or dismissed, 81 reversed. Percentage of reversals, 35.
- In 1899-1900, 189 appeals, 134 affirmed or dismissed, 54 reversed. Percentage of reversals, 28.
- In 1901-02, 225 appeals, 163 affirmed or dismissed, 30 reversed. Percentage of reversals, 28.
- In 1903-04, 253 appeals, 164 affirmed or dismissed, 89 reversed. Percentage of reversals, 35.
- In 1905-06, 292 appeals, 184 affirmed or dismissed, 108 reversed. Percentage of reversals, 36.
- In 1907-08, 314 appeals, 209 affirmed or dismissed, 105 reversed. Percentage of reversals, 33.
- In 1909-10, 280 appeals, 162 affirmed or dismissed, 124 reversed. Percentage of reversals, 43.
- In *1911-12, 469 appeals, 335 affirmed or dismissed, 134 reversed. Percentage of reversals, 28.5.
- In 1913-14, 579 appeals, 460 affirmed or dismissed, 119 reversed. Percentage of reversals, 20.5.
- In 1915-16, 550 appeals, 457 affirmed or dismissed, 93 reversed. Percentage of reversals, 16.9.
- In 1916-18, 506 appeals, 386 affirmed or dismissed, 120 reversed. Percentage of reversals, 23.7.
- In 1918-20, 420 appeals, 291 affirmed or dismissed, 129 reversed. Percentage of reversals, 30.7.

*From 1911 this table includes cases disposed of in Supreme Court and Court of Appeals.

CIRCUIT COURT OF AUTAUGA COUNTY.

Cecil E. Alexander, Solicitor (19th Circuit)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.				
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Negro.		White.		
										Convic- tions.	Acquittals.	Convic- tions.	Acquittals.	
Abusive language	1	1	1					1	1					1
Affray	1		1									1		
Assault to murder	6	1	3		2		1					1	5	1
Assault and battery	3	3						1		2	2			
Assault with weapon	4	3	1					1		1	1	1		
Bastardy	1		1	1										
Carrying concealed weapon	5	2	2	1						2	2	3		1
Detaining child	1		1											
Escape	1	1								1	1			
False pretense	1			1										
Failing to support children	1		1											1
Family deserting	1	1							1	1				
Forgery 2d degree	2	1					1	1	1	1			1	
Gaming	2	1			1									2
Hunting without permit	1	1								1	1			
Larceny, grand	20	7	3	9	1		7				3	6	5	2

CIRCUIT COURT OF BALDWIN COUNTY—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.		Negro.	White.	Convictions.	Acquittals.
Burglary	2	1	1	1	2									
Carnal knowledge	1	1											1	
Carrying concealed weapon	1	1								1			1	
Conspiracy	13	10		4				4		10			5	5
Gaming	6	1		5				1			1			
Larceny, grand	9	3		6			3				3			
Larceny, petit	11	8		3				1		7	4		4	1
Manslaughter, 1st degree	2	2					2				1		1	
Manslaughter, 2nd degree	7	7						8		7			7	
Murder, 1st degree	1	1												1
Murder, 2nd degree	1	1					1						1	
Prohibition law, violating	18	15		3				12		3	11	1	4	
Prohibition law, distilling	2		1	1								1		
Road law, violating	3		3									1		
Robbery	1	1					2				1			
Tick law, violating	3		1	2										1
Totals	97	57	7	32	2	2	7	26		35	23	3	29	8

Percentage of convictions, 58.7. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF BARBOUR COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.				
						Death.	Peniten- tary.	Hard Labor.	Jail.	Negro.		White.		
										Convic- tions.	Acquittals.	Convic- tions.	Acquittals.	
Prohibition law, distilling	9	8	1	.....	.....	.....	8	.....	.....	.....	4	.....	4	1
Road, failure to work	5	3	.....	2	.....	.....	.....	.....	.....	3	2	.....	1	.....
Selling property under lien	10	.....	1	9	.....	.....	.....	.....	.....	.....	.....	1	.....	.....
Trespass	1	1	.....	.....	.....	.....	.....	.....	.....	1	.....	.....	1	.....
Trespass after warning	1	1	.....	.....	.....	.....	.....	.....	.....	1	.....	.....	1	.....
Vagrancy	1	.....	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Totals	111	68	20	23	.....	.....	21	6	.....	41	50	9	19	11

Percentage of convictions, 61.2. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF BIBB COUNTY.

J. F. Thompson, Solicitor (4th Circuit).

Abusive language	2	2	—	—	—	—	—	—	—	—	2	—	—	—
Assaults to rape	2	—	—	2	—	—	—	—	—	—	—	2	—	—
Assault and battery	8	8	—	—	—	—	—	1	—	7	6	—	2	—
Burglary	7	6	1	—	—	—	6	—	—	—	6	—	2	1

CIRCUIT COURT OF BLOUNT COUNTY—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Bastardy	1	1		1										
Bestiality	1													
Burglary	2	2		1			2				2		1	
Carrying concealed weapon	3	2								2				
Defamation	1	1												
Forgery	1			1										
Larceny	7		1	5										
Murder	1	1					1						1	
Peddling without license	1			1										
Prohibition law, violating	12	5	3	3						5			5	2
Prohibition law, distilling	1		1											
Public drunkenness	1	1		1										
Removing property under lien	1	1		1										
Road law, violating	1	1		1										
Seduction	1	1					1						1	
Sunday law, violating	1	1								1			1	
Tick law, violating	1	1								1			1	

Tresspass	1	1	1	1	1	1	1	1	1
Totals	47	18	9	16	4	14	2	15	5

Percentage of convictions, 38.2. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF BULLOCK COUNTY.

T. M. Patterson, Solicitor (3rd Circuit).

Arson, 2nd degree	1				1					
Assault and battery	7	6	1					1	5	6
Assault to ravish	2	1	1					1	1	1
Burglary	6	6				5	1			6
Carrying concealed weapon	2	2							2	2
Check, giving fraudulent	2	2							2	2
Embezzlement	1				1					
Escape	1	1			1					
False pretense	3	2	1						2	2
Fence cutting	1		1							
Larceny, grand	11	10			1		1	9		10
Larceny, petit	2	2							2	2
Manslaughter, 1st degree	1	1					1			1
Murder, 2nd degree	3	2	1				2			2
Prohibition law, violating	3	1			2			1		1
Prohibition law, distilling	10	9	1					8	1	9

CIRCUIT COURT OF CALHOUN COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Color.					
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Fines Paid or Secured.		Negro.		White.	
												Convic- tions.	Acquittals.	Convic- tions.	Acquittals.
Auto law, violating	2	1	1	1						1			1		
Bastardy	3	1	1	1							1				
Bigamy	1			1											
Burglary	4	1	1	2			1				1	1			
Carnal knowledge	1			1											
Carrying concealed weapon	4	2	1		1					2		1	2		
Defamation	2		1		1										
Disturbing religious worship	1			1											
Escape	1	1	1					1			1				
False pretense	3			3											
Fighting in public place	1				1										
Forgery	1	1					1				1				
Larceny, grand	16	8	2	4	2		8				8	2			
Larceny, petit	11	10	1					1	1	9	7		3	1	
Manslaughter, 1st degree	3	3					3						3		
Murder, 1st degree	4	3	1			1	2				1		2	1	
Murder, 2nd degree	3	3					3				2		1		

Prohibition law, violating	26	17	5	4				10		17	6	1	11	4
Prohibition law, distilling	22	14	4	4		12				2	2		10	4
Public drunkenness	3	2		1						2	2		2	
Resisting officer	1	1								1	1			
Selling mortgaged property	2		1	1								1		
Shooting across public road	2	2								2			2	
Slot machine, operating	1	1								1			1	
Tick law, violating	2			2										
Trespass	4	3	1							3	2		1	1
Totals	147	86	23	31	7	1	30	12	1	49	36	7	48	15

Percentage of convictions, 58.5. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CHAMBERS COUNTY.

W. B. Bowling, Solicitor (5th Circuit).

Abusive language	1	1								1	1			
Adultery	4	4				1				3	2		1	
Arson, 2nd degree	2		1	1								1		
Assault and battery	1	1								1	1			
Assault with weapon	11	8		3				1		7	6		2	
Assault to murder	9	6		3		6					6			
Bastardy	1	1										1		
Burglary	5	3		1	1	3				1	2		2	

CIRCUIT COURT OF CHAMBERS COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Abated or Withdrawn.	Number Sentences to				Color.			
					Death.	Peniten- tiary.	Hard Labor.	Jail.	Fines Paid or Secured.	Convic- tions.	Acquittals.	White.
Carrying concealed weapon	4	3		1					3	2		1
Escape	3	3					3		1	3		
False pretense	1	1				1				1		
Felony, attempt	2	2							2	1		1
Game of chance, operating	5	5							5			5
Gaming	8	1	1	6					1			1
Larceny, grand	13	12	1	1		6	5			10		2
Larceny, petit	4	4						1	4	3		1
Manslaughter, 1st degree	4	3	1			3				2	1	1
Manslaughter, 2nd degree	1	1					1			1		
Murder, 1st degree	2	2			1	1				2		
Murder, 2nd degree	1	1				1						1
Perjury	1			1								
Pool, permitting minor to play	2	2							2			2
Presenting gun	1	1							1	1		
Prohibition law, violating	13	10		3			5		4	7		3
Prohibition law, distilling	4	3		1		4	1			2		1

[illegible]

Percentage of convictions, 75. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CHEROKEE COUNTY.

A. E. Hawkins, Solicitor (9th Circuit).

Abusive language	4	2	2					2	1	2	1
Adultery	1	1						1		1	
Affray	1	1						2		2	
Animal, injury to	1						1				1
Arson	1		1								1
Assault	3	3						3		3	
Assault to ravish	1	1			1			1			
Assault and battery	3	1	1					1	1	1	1
Bastardy	1					1			1		
Betting at public place	3	1	1					1	1	1	1
Burglary	1		1								1
Carrying concealed weapon	3	3						3		3	
Defamation	1		1								1
Disturbing religious worship	1	1						1		1	
Embezzlement	2		1			1					1

CIRCUIT COURT OF CHEROKEE COUNTY. Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.		Negro.	Acquittals.	Convictions.	White.
Fence breaking	1	1		1										1
Larceny, grand	1	1					1						1	
Larceny, petit	1			2										
License, doing business without	1	1								1			1	
Murder, 1st degree	1	1					1						1	
Murder, 2nd degree	1			1										
Prohibition Law, violation	4	7	4	3	1								6	3
Prohibition Law, distilling	6	2	2	3	2		2				1	2	2	3
Prohibition Law, possessing still	2	2	1				2						2	1
Public drunkenness	7	3	1	2	1					3			4	3
Road law, violating	2	1		1						1	1			1
Selling mortgaged property	1	1		1										1
Sunday Law, violating	1	1		1										1
Trespass	2			2										2
Vagrancy	1	1		1										
Totals	59	34	9	25	7		7			19	3	6	31	26

Percentage of convictions, 57.6. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CHILTON COUNTY.
Cecil E. Alexander, Solicitor (19th Circuit).

Abusive language	10	6	3	1					6			6	3
Assault and battery	5	4		1				1	2			4	
Assault with weapon	1	1							1			1	
Assault to murder	2	1	1					1			1		1
Burglary	1	1						1			1		
Carrying concealed weapon	2	1	1						1			1	1
Embezzlement	3			3									
Larceny, grand	2	2						2				2	
Larceny, petit	2	1		1					1			1	
Manslaughter, 2nd degree	1	1						1	1	1			
Murder, 1st degree	4		2	1	1						1		1
Murder, 2nd degree	1	1						1				1	
Prohibition law, violating	18	7	7	4				4	3	2	4	1	1
Prohibition law, distilling	4	3	1					1	2		3	1	1
Road, obstructing	1			1									1
Selling mortgaged property	1			1									
Train, riding	1	1							1			1	
Trespass	3			3									
Totals	62	30	15	16	1			6	6		18	6	3
											24		9

Percentage of convictions, 48.3. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CHOCTAW COUNTY.

F. E. Poole, Solicitor (First Circuit)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Color.			
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Fines Paid or Secured.	Convic- tions.	Acquittals.	White. Convic- tions.
Abusive language	2	1	1	1						1	1	1	1
Adultery	1			1							1	1	
Animals, injury to	1		1								1	1	
Assault and battery	2	2								2	2		
Assault with weapon	1		1								1	1	
Burglary	1			1							1	1	
Carrying concealed weapon	6	3		2	1					2	3	1	2
Dog tax, failure to pay	1		1	1							1	1	
Gaming	7	7								7	2		5
Manslaughter, 1st degree	1	1					1						1
Murder, 1st degree	2	1	1	1			1				1	1	
Murder, 2nd degree	3	3					1		2	2	2		1
Larceny, petit	8	5		3						5	5	3	
Obstructing public road	1		1									1	
Presenting fire arms	1	1								1			1
Prohibition law, violation	9	8		1						8	8	1	

[illegible]

Percentage of convictions, 62.7. Predominant crime, Violating Prohibition Law

CIRCUIT COURT OF CLARKE COUNTY.

F. E. Poole, Solicitor (1st Circuit).

Abusive language	1	1	1	1	1
Animals, injury to	4	2	2	2	2
Arson, 2nd degree	1	1	1	1	1
Assault and battery	6	6	1	8	2
Assault with weapon	9	8	1	8	2
Bastardy	1	1	1	1	1
Burglary	3	3	3	3	3
Carrying concealed weapon	6	3	2	3	2
Disposing of property under lien	1	1	1	1	1
Embezzlement	1	1	1	1	1
False pretense	1	1	1	1	1

CIRCUIT COURT OF CLARKE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.				
						Death.	Peniten- tiary.	Hard Labor.	Jail.		Negro.		White.		
											Convic- tions.	Acquittals.	Convic- tions.	Acquittals.	
Game law violation	1	1								1	1				
Gaming	7	2		5						2	1	5	1		
Larceny, grand	4	1		2	1						1	1			
Larceny, petit	8	6		2						6	6	1			2
Manslaughter, 2nd degree	2	2								2	2				1
Murder	1	1				1					1				
Murder, 2nd degree	1	1					1						1		1
Peace proceedings	1												1		
Poison, putting out	1	1								1					
Prohibition law, violation	16	11		5						11	7	5	4		
Public drunkenness	2	2								2			2		
Roads, failure to work	3			3								1			2
Shooting across road	1	1								1			1		
Tick law, violation	4	1	1	2						1			1	1	3
Vagrancy	2	1								1		1	1		
Totals	88	54	4	26	3	1	1	4	2	48	34	19	20		16
Percentage of convictions, 61.3. Predominant crime, Violating Prohibition Law.															

CIRCUIT COURT OF CLAY COUNTY.
W. W. Wallace, Solicitor (18th Circuit).

Abusive language	3	3							3				3		
Affray	1	1							1				1		
Assault with weapon	4	2		2					2			1	1		
Assault to murder	1	1						1				1			
Burglary	3	3		1				2				1	1		
Carrying concealed weapon	2	1		1								1	1		
Disturbing religious worship	2	2							2				2		
Dog tax, failure to pay	3			2	1										
Forgery, 3d degree	4	1		3				1				1			
Gaming	1				1										1
Larceny, grand	1	1						1							
Larceny, petit	4	3		1					3	1			2		
Murder	2	1		1				1					1		
Prohibition law, violating	4	3		2	4							3	3	2	
Prohibition law, distilling	4	2		1	1			2						1	
Public drunkenness	1			1											
Road law, violating	1			1											
Totals	46	25	5	15	2			7	1	3	16	8	16	5	

Percentage of convictions, 54.3. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CLEBURNE COUNTY.

• J. B. Sanford, Solicitor (7th Circuit).

Character of Offense	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to					Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.	Fines Paid or Secured.	Negro.		White.	
											Convictions.	Acquittals.	Convictions.	Acquittals.
Abusive language	14	13			1					6				6
Assault	4	1		3						1				1
Assault with weapon	3	3								2				
Assault and battery	4	3	1							3				3
Burglary	1			1										
Carrying concealed weapon	6	3		3						2				2
Disturbing religious worship	3	2	1							1				1
Embezzlement	1			1										
False pretense	2	1		1										
Forgery, 3rd degree	1	1					1				1			
Larceny, grand	3	3					3				3			
Larceny, petit	1	1							1	1	1			
Manslaughter, 1st degree	1	1					1							
Murder, 2nd degree	1		1											
Prohibition law, violating	26	7	9	10			1						5	5
Public drunkenness	9	5		3	1					4				5

[illegible]

Percentage of convictions, 49.4. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF COFFEE COUNTY.

R. H. Jones, Solicitor (12th Circuit).

[illegible]

CIRCUIT COURT OF COFFEE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.	Fines Paid or Secured.	Convictions.	Acquittals.	White.
Embezzlement	1	1								1			1
Enticing apprentice	1	1								1		1	
False pretense	4	3		1						3		3	
Fence, taking	1				1								
Food law, violating	2	1	1							1			1
Forgery	4	2	1	1		2					2		1
Gaming	1	1											
Larceny, grand	2			1	1								
Larceny, petit	9	8								9	3		6
Malicious mischief	4	3	1							3			3
Murder, 1st degree	4		3	1								1	2
Murder, 2nd degree	4	2	2				2				2	1	1
Prohibition law, violating	41	16	14	9	3		1	5		14	8	1	10
Public drunkenness	2									1			1
Road law, violating	1			1									
Seduction	2	1	1			1							1
Selling property under lien	1				1								

Selling property of co-tenant	1	1	1	1	1	1	1	1	1	1	1	1	1
Shooting at dwelling	1	1	1	1	1	1	1	1	1	1	1	1	1
Shooting across road	1	1	1	1	1	1	1	1	1	1	1	1	1
Tick law, violating	1	1	1	1	1	1	1	1	1	1	1	1	1
Trespass	6	6	6	6	6	6	6	6	6	6	6	6	6
Totals	147	68	31	36	9	11	5	1	56	24	5	45	19

Percentage of convictions, 46.2. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF COLBERT COUNTY.
H. D. Jones, Solicitor (11th Circuit).

Arson	1	1							
Assault	5	4		1					4
Assault with weapon	4	3		1					2
Assault to murder	4	2		1		1			1
Burglary	12	8	2	1		7		1	2
Carrying concealed weapon	7	4	1	2				1	2
Check, giving worthless	1	1		1					1
Disturbing religious worship	4	3						3	
Embezzlement	3	1	1	1		1			
False pretense	3			1	2				
Forgery	3	3						1	1
Gaming table, keeping	1	1							

CIRCUIT COURT OF COLBERT COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.			
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Fines Paid or Secured.	Convic- tions.	Acquittals.	White. Convic- tions.
Larceny, grand	19	9		4	2		6	1		4			
Larceny, petit	7	5		1						3			
Manslaughter, 1st degree	7	7					7						
Miscegenation	1	1					1						
Murder, 1st degree	25		3	22									
Murder, 2nd degree	6	3	2	1			3						
Prohibition law, violating	31	15	2	14				1		14			
Prohibition law, distilling	7	7					7			2			
Public drunkenness	4	2	2	2									
Receiving stolen property	2	2	2				1			1			
Robbery	5	2	2	1			2						
Slot machine, operating	2	2								2			
Trespass	2			2									
Vagrancy	3		1	2						4			
Totals	169	84	15	58	4		36	9	1	42			

Percentage of convictions, 49.7. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CONECUH COUNTY.

G. O. Dickey, Solicitor (21st Circuit)

Assault and battery	4	3			1			3	2	1	
Assault with weapon	5	5						5	3	2	
Assault to murder	5	2	1	2			2		1	1	
Assault to rape	1		1							1	
Blue sky law, violating	1	1						1		1	
Burglary	11	11				11			10	1	
Carnal knowledge	1			1						1	
Carrying concealed weapon	1	1						1		1	
Forgery, 1st degree	3	3				3			3		
Gaming	3	1		2							
Incest	2	1		1					1		
Larceny, grand	8	4		4		4			4		
Larceny, petit	11	3	1	7			1	2	3	1	
Murder, 1st degree	5	2		3		2			2		
Murder, 2nd degree	1			1							
Presenting gun	1			1							
Prohibition law, violating	17	4		10	3						
Prohibition law, distilling	3	3				3			4	3	1
Road law, violating	1	1							3		
Stock law, violating	1	1					1		1	1	
Sunday law, violating	1	1							1	1	
Threatening letter, sending	1			1							

CIRCUIT COURT OF CONECUH COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.	Fines Paid or Secured.		Negro.	
												Convictions.	Acquittals.
Tick law, violating	8			8									
Trespass	7			7									
Totals	102	47	3	48	4	2	23	2		19	36	3	10

Percentage of convictions, 46. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF COOSA COUNTY.

W. W. Wallace, Solicitor (18th Circuit).

Assault with weapon	5	4		1				1		3	4		
Assault to murder	1		1										1
Bastardy	4	1	1	2							1		
Burglary	1	1					1				1		
Embezzlement	3			3									3
False pretense	2			2									
Larceny, petit	1	1							1	1	1		

[illegible]

Percentage of convictions, 39.1. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF COVINGTON COUNTY.

R. H. Jones, Solicitor (12th Circuit).

Abandonment	4	1	1	2					1	1
Abusive language	4	4							4	3
Adultery	4	2	1	1					1	1
Affray	3		1	2						1
Arson, attempt	1			1						
Assault to rape	1	1					1		1	
Assault and battery	4	3	1						3	3
Assault with weapon	12	16					2		11	1
Assault to murder	3	2		1			1	1	2	

CIRCUIT COURT OF COVINGTON COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.				
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Negro.		White.		
										Convic- tions.	Acquittals.	Convic- tions.	Acquittals.	
Auto law, violating	3	1	1	1						1	1			1
Bastardy	1	1								1			1	
Burglary	5	3	1	1				3			3	1		
Carrying concealed weapon	17	12	1	2				2		13	5	1	9	1
Check, giving bad	3	2		1				1		1			2	
Disturbing religious worship	2	1	1							1			1	1
Enticing laborers	1		1									1		
False pretense	2			2										
Fence, destroying	2	2						1		2	1		2	1
Forgery, 2nd degree	9	7	2				6						6	1
Larceny, grand	7	1	5								1			5
Larceny, petit	7	5	2							5	2		2	1
License, doing business without	3	1	1		1					2	1			1
Malicious mischief	1	1								1			1	
Manslaughter, 1st degree	3	3					3				2		1	
Manslaughter, 2nd degree	1		1								2		1	1
Murder, 2nd degree	2	1		1			1						1	

[illegible]

Percentage of convictions, 62.3. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CRENSHAW COUNTY.

W. H. Stoddard, Solicitor (2nd Circuit).

	7	6	1				1	6	7	1
Abusive language										
Animals, cruelty to	1	1						1	1	
Assault and battery	4	4						3	1	3
Assault to murder	1	1					1			
Assault with weapon	10	9	1					9	7	2
Burglary	2	1	1						1	
Carrying concealed weapon	5	3	2					1	3	
Cattle, failure to dip	16	1	12	3				1		1
Defamation	1			1						

CIRCUIT COURT OF CULLMAN COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.			
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Fines Paid or Secured.	Convic- tions.	Acquittals.	White. Convic- tions.
Murder, 2nd degree	1	1	—	—	—	—	1	—	—	—	—	—	1
Obstructing public road	1	—	1	—	—	—	—	—	—	—	—	—	—
Perjury	5	2	2	1	—	—	2	—	—	—	2	—	3
Presenting gun	1	1	—	—	—	—	—	—	—	—	—	—	—
Prohibition law, violating	55	27	11	19	1	—	—	3	1	21	24	31	—
Prohibition law, distilling	20	13	5	2	—	13	—	—	—	—	13	7	—
Prohibition law, having still in possession	2	2	—	—	—	—	—	—	—	2	—	—	—
Public drunkenness	14	13	—	1	—	—	—	—	—	13	13	—	—
Seduction	3	2	1	—	—	—	2	—	—	—	2	—	—
Selling mortgaged property	1	—	—	1	—	—	—	—	—	—	—	—	—
Selling cigars to minors	1	—	—	1	—	—	—	—	—	—	—	—	—
Sodomy	2	2	—	—	—	—	2	—	—	—	2	—	—
Sunday law, violating	1	1	—	—	—	—	—	—	—	—	—	—	—
Tick law, violating	1	—	1	—	—	—	—	—	—	—	—	—	—
Vagrancy	4	1	1	2	—	—	—	—	—	1	—	—	—
Totals	187	94	31	57	7	29	3	1	57	87	94	94	94

Percentage of convictions, 50.2. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF DALE COUNTY.
T. M. Patterson, Solicitor (3rd Circuit).

Abusive language	1	1								1								1		
Adultery	3	2	1							2	1							1		
Assault and battery	7	7								7	1							3		
Assault to murder	3			3																
Assault to rape	1	1										1								
Bigamy	1	1										1								
Carrying concealed weapon	2	1	1							1	1									
Check, giving worthless	3	2		1						2								2		
Forgery, 2nd degree	1		1																	1
Larceny, petit	3	2		1								2						2		
Manslaughter, 1st degree	2	2										2						1		
Murder, 2nd degree	1			1																
Presenting gun	1	1																		
Prohibition law, violating	8	5	1	2						1	1							4		
Prohibition law, distilling	4	2	2								2	1						1	2	1
Seduction	1			1																
Selling mortgaged property	3		1	2																1
Shooting across public road	1	1										1						1		
Trespass	1			1																
Totals	55	32	8	15						18	11		3	18				5		

Percentage of convictions, 58.1. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF DALLAS COUNTY.
J. F. Thompson, Solicitor (4th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.				
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Negro.		White.		
										Convic- tions.	Acquittals.	Convic- tions.	Acquittals.	
Assault and battery	30	30						11		25	28			
Assault to murder	2		1	1						1		2		
Bastardy	1	1									1			
Bigamy	1	1					1							
Burglary	20	14	2	4			10	4			14	6		
Carrying concealed weapon	37	34		3				7		29	34	3		
Dice, playing in public	3	3								3	1		2	
Escape	2	2						1				1	1	
Felony, attempt	3	3								3	3			
Forgery	6	6					2	4			5		1	
Larceny, grand	12	9	2	1			2	7			8	3	1	
Larceny, petit	15	14		1				4		9	13	2		
Manslaughter, 1st degree	4	4					4				4			
Manslaughter, 2nd degree	2	2						1		1	2			
Murder, 1st degree	6	2	4								2	1		2
Murder, 2nd degree	3	3					3				3			

Presenting gun	3	2	1	1	1	2	1
Prohibition law, violating	48	35	1	12	15	20	35
Prohibition law, distilling	10	8	2		8		2
Resisting officer	2	1		1	1		1
Revenue law, violating	2			2			1
Road law, violating	17	14		3		5	3
Selling mortgaged property	1						1
Tick law, violating	4	3		1			3
Totals	234	191	13	30	33	96	173
					56		14
							4

Percentage of convictions, 81.6. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF DEKALB COUNTY.

A. E. Hawkins, Solicitor (9th Circuit)

Abusive language	6	3	3						2	1
Adultery	2			1						
Animals, injury	1		1							1
Assault	2	1	1							
Assault and battery	8	5	1	2					2	1
Assault to rape	4	2	2							
Assault to murder	4	2	1	1	3					
Bastardy	1	1							1	
Betting at cards	1		1							

[illegible]

Percentage of convictions, 34. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF ELMORE COUNTY.

Cecil E. Alexander, Solicitor (19th Circuit).

Abusive language	2	2						2		2
Animals, injury to	1		1							
Arson, 2nd degree	1		1							
Assault and battery	5	3		2				3	1	2
Assault to murder	2			2						
Assault with weapon	2	1	1					1	1	1
Auto, operating without license	1									
Bail, default in	1									
Bastardy	1	1							1	

[illegible]

Percentage of convictions, 43.3. Predominant crime, Embezzlement.

CIRCUIT COURT OF ESCAMBIA COUNTY.

G. O. Dickey, Solicitor (21st Circuit).

Abandonment	1				1					
Abusive language	4	2			2			2		2
Adultery	5				5					
Animal, injury to	1				1					
Assault to murder	2				7	1				
Assault with weapon	6	3			3			3		3
Assault and battery	4	2			1	1		2		2
Burglary	3	3					3			
Carrying concealed weapon	7	2			5		1	1		1
Detaching train	1				1					
Disturbing religious worship	1				1					
Embezzlement	1				1					
Escape	3				1	1				
Forgery, 1st degree	1	1					1			1
Gaming	4				4					

CIRCUIT COURT OF ESCAMBIA COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.	Negro.		White.	
										Convictions.	Acquittals.	Convictions.	Acquittals.
Larceny, grand	6	2		2	2		2			2			
Larceny, petit	16	12		4				2		6		5	
Murder, 2nd degree	2			2									
Prohibition law, violating	12	3	3	3	3					1	2	2	1
Prohibition law, distilling	2	2						2		2			
Public drunkenness	1			1									
Road law, violating	3	1		3								1	
Seduction	1			1									
Trespass	4			4									
Totals	91	33	3	52	9		3	8		22	14	2	18
													1

Percentage of convictions, 36.2. Predominant crime, Petit Larceny.

CIRCUIT COURT OF ETOWAH COUNTY.

M. C. Sivley, Solicitor (16th Circuit).

Abusive language	3	3								3			2
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[illegible]

Percentage of convictions, 63.6. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF FAYETTE COUNTY.
J. M. Pennington, Solicitor (14th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequites.	Abated or Withdrawn.	Number Sentences to				Color.				
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Negro.		White.		
										Convic- tions.	Acquittals.	Convic- tions.	Acquittals.	
Abandonment of family	1	1								1				1
Assault and battery	5	2		1						2	1		1	
Abusive language	1	1								1			1	
Animals, cruelty to	1	1								1			1	
Arson	1			1										
Assault and battery	7	3		1						3			3	
Burglary	6		1	4	1							1		
Carrying concealed weapon	4	4								4			4	
Larceny, petit	1	1								1			1	
Malicious mischief	1	1						1						
Manslaughter, 1st degree	2	2					2							
Manslaughter, 2nd degree	1	1												
Murder, 1st degree	2	2								1	1			
Murder, 2nd degree	5	4	1				3			1	4			
Prohibition law, violating	34	18	1	7	3					23	1		14	1
Public drunkenness	12	9	2	1						9	1		8	2
Road law, violating	3	1			2					1	1			

[illegible]

Percentage of convictions, 58.3. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF FRANKLIN COUNTY.

H. D. Jones, Solicitor (11th Circuit).

[illegible]

[illegible]

Percentage of convictions, 50. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF GENEVA COUNTY.

E. H. Hill, Solicitor (20th Circuit).

Abusive language	7	3		2	1		1		3		4
Adultery	1	1							1	1	
Assault with weapon	2	2							2		2
Assault to murder	6	4		2			1	1	2	1	3
Assault and battery	1	1							1		1
Assault to rape	1		1							1	
Bastardy	1				1						
Betting at dice	1	1							1		1
Burglary	1	1				1					1
Carrying concealed weapon	2	1		1					1	1	
Dog tax, failure to pay	4			4							
Disturbing religious worship	3	1		2					1		1
False pretense	2	2					1	1		2	
Forgery, 1st degree	2				2						

CIRCUIT COURT OF GENEVA COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.			
						Death.	Peniten- tiary.	Hard Labor.	Fine.	Negro. Convic- tions.	Negro. Acquittals.	White. Convic- tions.	White. Acquittals.
Forgery, 2d degree	1	1		1									
Larceny, grand	3	2		1			1	1		4	2	4	
Larceny, petit	8	5	1	2					1			1	
License, doing business without	1	1		1									
Murder, 1st degree	5	4	1				4			3		1	
Murder, 2d degree	1	1					1					1	
Presenting gun	1	1							1			1	
Prohibition law, violating	24	15		8	1			2	13	3		12	
Prohibition law, distilling	5	1	2	1	1		1				2	1	
Public drunkenness	3	1		2					1				1
Road law, violating	1	1	1										
Receiving stolen property	1	1							1			1	
Robbery	2	2					2			2			
Tick law, violating	9	2			7							2	
Totals	99	52	6	27	13		12	6	33	15	4	37	1

Percentage of convictions, 52.5. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF HALE COUNTY.

J. F. Thompson, Solicitor (4th Circuit)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Color.				
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Fines Paid or Secured.	Negro.		White.	
											Convic- tions.	Acquittals	Convic- tions.	Acquittals
Abusive language	3	2		1						1			2	
Animals, cruelty to	1	1								1	1			
Assault and battery	16	13		3				1		12	11		2	
Bastardy	1		1											1
Burglary	4	2		2			2				2	1		
Carrying concealed weapons	9	5	2	2						5	3	2	2	
Contempt of court	1	1								1			1	
Embezzlement	2			2								1		
Forgery, attempt	1	1								1	1		1	
Gaming	1	1								1	1		1	
Larceny, grand	1			1										
Larceny, petit	12	10		2					2	6	8	1	1	
Manslaughter, 1st degree	1			1								1		
Murder, 2nd degree	1	1							1			1		
Presenting gun	1	1								1			1	
Prohibition law, violating	13	6		4	3						6	6	1	

[illegible]

Percentage of convictions, 58.7. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF HENRY COUNTY.

E. H. Hill, Solicitor (20th Circuit).

Arson, 2nd degree	1	1				1			
Assault	1	1						1	
Assault to murder	1	1			1			1	
Assault and battery	2	2				2		2	
Bastardy	1		1						
Burglary	3	3				3		2	1
Carrying concealed weapon	1	1		1			1		1
Disturbing religious worship	2	2				2		2	
Disturbing women	1	1				1		1	
Embezzlement	1		1						
Larceny, grand	2	2	1				2	2	
Murder	4	1			3				
Prohibition law, violating	3	1	2			1		1	1

CIRCUIT COURT OF HENRY COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.			
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Fines Paid or Secured.	Convic- tions.	Acquittals.	White. Convic- tions.
Receiving stolen property	1			1								1	
Sunday law, violating	6	4		2						4	1		3
Totals	30	18	3	7	3		1	6		11	13	2	5

Percentage of convictions, 60. Predominant crime, Violating Sunday Law.

CIRCUIT COURT OF HOUSTON COUNTY.

E. H. Hill, Solicitor, 20th Circuit).

Abusive language	6	1		4						1			1	2
Assault and battery	8	5	1	2						5	1		4	2
Assault to rape	1	1					1				1			
Assault to rob	1	1					1						1	
Carnal knowledge	1	1					1						1	
Carrying concealed weapon	2			2										
Defamation	1	1								1			1	

[illegible]

Percentage of convictions, 47.6. Predominant crimes, Violating Prohibition Law, Assault and Battery.

CIRCUIT COURT OF JACKSON COUNTY.

A. E. Hawkins, Solicitor (9th Circuit).

[illegible]

CIRCUIT COURT OF JACKSON COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.		Negro.		White.	
											Convictions.	Acquittals.	Convictions.	Acquittals.
Assault	4	3	1							3			3	1
Assault and battery	1	1						1					1	
Arson	1			1										1
Bigamy	1	1					1						1	
Carrying concealed weapon	3	2		1						2			2	1
Concealing stolen property	1													1
Disturbing religious worship	4	2		1	1					3			3	1
Embezzlement	1	1					1						1	
Gaming	1		1											1
Larceny, grand	1	1							1				1	
Larceny, petit	4	4							3	4	1			4
License, failing to pay	2	1								1			1	1
Manslaughter, 1st degree	3	2	1				2				1		1	1
Manslaughter, 2nd degree	1	1							1	1			1	
Murder, 2nd degree	6	6					6				2		4	
Perjury	1	1											1	
Prohibition law, violating	10	6		3	1					3	2		4	4

[illegible]

Percentage of convictions, 61. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF JEFFERSON COUNTY.

Joseph R. Tate, Solicitor (10th Circuit).

Abduction	1			1				
Abandonment	10	2	1	7		2		
Abusive language	80	14	21	32	13	1		13
Adultery	30	4	8	10	8			3
Advertising law, violating	1			1				
Affray	1			1				
Animals, injury to	7	1		3	3			
Animals, trading diseased	1				1			
Arson	1				1			
Assault	8	6	1	1				1 5
Assault and battery	66	38	8	17	3			12. 18
Assault with weapon	137	37	46	35	17			32
Assault to murder	69	12	20	30	7		5	7
Assault to rape	1	1					1	

False pretense	45	8	5	26	6	4	4	
Felony, attempt	4	4				4	4	
Fighting cocks	6	2		2				2
Forgery, 1st degree	30	17		13		15	2	
Forgery, 2nd degree	24	9		14	1	5	4	
Gaming	53	5		43	5			4
Gaming table, keeping	2			1	1			
Larceny, grand	291	135	65	83	8	87	66	
Larceny, petit	67	33	11	17	6		27	3
Libel	2			2				
License, doing business without	1		1					
Liquors, condemnation	47	47						
Lottery	2	1		1				1
Malicious mischief	10	3		2	3			1
Manslaughter, 1st degree	10	7	1	2		5	2	
Manslaughter, 2nd degree	20	10	5	1	4		8	3
Mining law, violating	1	1						1
Miscegenation	4	3			1	2		
Murder, 1st degree	49	16	17	12	4	1	15	
Murder, 2nd degree	39	18	14	7		18		
Peace proceedings	3		2	1				
Perjury	3		1	2				
Pool, permitting minor to play	5	1			4			1
Presenting gun	16	3	9	4				4
Prohibition law, violating	912	478	103	290	41	45	1	428

CIRCUIT COURT OF JEFFERSON COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.				
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Negro.		White.		
										Convic- tions.	Acquittals.	Convic- tions.	Acquittals.	
Prohibition law, distilling	26	8	6	5	7		3	1	2	4				
Profiteering	1			1										
Public drunkenness	29	14	1	13	1			1		13				
Rape	1		1											
Reckless driving	4	2		2						2				
Resisting officer	4			3	1									
Revenue law, violating	19	2	2	15						2				
Robbery	38	14	14	7	3		14							
Seduction	3			2	1									
Selling mortgaged property	9		2	2	5									
Slander	1			1										
Sodomy	1	1							1					
Soliciting labor	1			1										
Stock law, violating	7				7									
Stolen property, bringing into state	41	29	3	9										
Stolen property, buying, etc.	54	34	4	12	2		13	16	4	1				
Tick law, violating	96	1	46	40	9					1				

[illegible]

Percentage of convictions, 40.8. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF LAMAR COUNTY.

J. M. Pennington, Solicitor (14th Circuit).

Abusive language	2	1	1	1	1	1
Assault to murder	3		2			
Assault and battery	2	1	1	1	1	1
Burglary	3		1	3		
Carrying concealed weapon	2	2	2			2
Disturbing religious worship	6	6			6	6
Embezzlement	1		1			
Gaming	2	2			1	1
Larceny, grand	1					
Larceny, petit	2			1	2	2

CIRCUIT COURT OF LAMAR COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.	Convictions.	Acquittals.	Negro.	White.
Murder, 1st degree	3			2									
Prohibition law, violating	7	3	1	4						2			1
Prohibition law, distilling	3	3					1						
Public drunkenness	7	7								7			
Stock law, violating	1	1								1			
Tick law, violating	3	1	1	1						1			1
Totals	49	29	4	13	4		1			26	1	25	4

Percentage of convictions, 59.1. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF LAUDERDALE COUNTY.

H. D. Jones, Solicitor (11th Circuit).

Abusive language	7	3		4									
Adultery	6	4		3						2			
Animals, injury to	1		1							2			1

[illegible]

CIRCUIT COURT OF LAUDERDALE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Peniten- tiary.	Hard Labor.	Jail.		Negro.		White.	
											Convic- tions.	Acquittals.	Convic- tions.	Acquittals.
Prohibition law, distilling	19	14	3	4			12			2	1	2	5	
Public drunkenness	21	16		4						12		6		
Resisting officer	1	1	1	2				1						
Robbery	1	1					1							
Seduction	1			1										
Selling pistol to minor	1	1								1				
Selling cigars to minor	4	4								4				
Selling mortgaged property	4	2		2						2				
Shooting across public road	1			1										
Stock law, violating	1	1												
Vagrancy	7	2	3	2									3	
Totals	271	166	24	86	1		57	11	2	71	12	3	24	14

Percentage of convictions, 61.2. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF LEE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.	Fines Paid or Secured.	Convictions.	Acquittals.	White.
Assault to murder	2	2					2				2		
Assault to rape	1	1					1				1		
Burglary	15	9	1	3	2		5	3		1	5		3
Concealing stolen property	1	1								1	1		
Carrying pistol	1		1										
False pretense	2	2						1		1	2		
Forgery	1	1								1	1		
Gaming	10	10								10			10
Larceny, grand	14	10	1	3			1	4		5	5		4
Larceny, petit	5	5								5	3		2
Manslaughter, 1st degree	5	5					5				5		
Manslaughter, 2nd degree	1	1						1			1		
Murder, 1st degree	6	2	1	3			2				1		1
Murder, 2nd degree	3	3					3				3		
Prohibition law, violating	40	26	4	10				23		3	22		6
Rape	1	1					1				1		
Selling property under lien	1	1						1			1		

[illegible]

Percentage of convictions, 70.7. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF LIMESTONE COUNTY.

D. C. Almon, Solicitor (8th Circuit).

Abusive language	3	2	1					2	1	1
Adultery	3	1	2				1			1
Assault and battery	4	3	1					3		3
Assault with weapon	10	10						10	3	7
Assault to murder	4	3	1			3		1		2
Auto law, violating	1	1						1		1
Burglary	2	2			2					2
Carrying concealed weapon	9	6	2	1				6	3	4
Disturbing religious worship	2	1	1							3
Escape	2	1		1		1			1	2
False pretense	1	1								
Forgery	6	4		2		2		1	2	2
Gaming	5	2	3					2	1	3
Larceny, grand	8	8				8			2	1
Larceny, petit	1	1	1				1		1	

CIRCUIT COURT OF LIMESTONE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
					Death.	Penitentiary.	Hard Labor.	Jail.		Convicted.	Acquittals.	Convicted.	Acquittals.
License, practicing medicine without	3	3				2			1		3		
Malicious mischief	1		1										1
Manslaughter, 1st degree	2	2				2					2		1
Manslaughter, 2nd degree	1	1					1				1		
Murder, 1st degree	5	3	1	1		3					2	1	1
Murder, 2nd degree	2	2				2					2	1	
Presenting gun	1	1							1			1	
Prohibition law, violating	3	2		1			1		1			1	
Prohibition law, distilling	4	2	2	1		1						1	3
Public drunkenness	7	7							7			7	
Road law, violation	44	24	1	6					24		2	1	14
Stolen property, bringing into state	1	1											
Totals	136	93	27	16		26	3	1	59		27	2	36

Percentage of convictions, 68.3. Predominant crime, Violating Road Law.

CIRCUIT COURT OF MACON COUNTY.

W. B. Bowling, Solicitor (5th Circuit).

Character of Offense	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.	
						Death.	Penten-tiary.	Hard Labor.	Jail.		Negro.	White.
Abusive language	1	1		1								
Assault	2	2								2		1
Assault to murder	2		1	1							1	
Assault with weapon	4	3		1						3	2	
Bigamy	1	1				1						
Burglary	5	5					5				1	
Carnal knowledge	1		1									
Forgery	6	5		1			5				2	
Larceny, grand	6	3	1	2			3				2	1
Larceny, petit	5	4		1				1			3	
Manslaughter, 1st degree	2	1		1			1					
Murder, 2nd degree	4	4					4				4	
Presenting gun	1			1								
Prohibition law, violating	1			1								
Prohibition law, distilling	7	7					7				4	2
Robbery	2	1		1			1				1	

[illegible]

Percentage of convictions, 71.1. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF MADISON COUNTY.

D. C. Almon, Solicitor (8th Circuit)

Abusive language	3	1	2				1		1	1
Arson, 1st degree	1	1			1					1
Arson, 2nd degree	1		1							
Assault and battery	2		2							
Assault	1	1	1							
Assault to rape	3	2	1			2			1	1
Assault with weapon	15	10	1	4			10	7		2
Assault to murder	2	1	1		1				1	
Bastardy	3	2	1				2	1	1	
Bigamy	1	2			1					1
Burglary	4		1	1	2					
Carnal knowledge	2		2						1	
Carrying concealed weapon	18	15	1	2		1	14	5		8
Defamation	1		1							
Embezzlement	1	1	1						1	
False pretense	3	2		1			2	1		1

[illegible]

Percentage of convictions, 57.7. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF MARRENGO COUNTY.

B. G. Wilson, Solicitor (17th Circuit).

Animals, temporarily using	1	1							1
Animals, injury to	1	1							
Assault and battery	5	5							5
Assault to murder	4	4							
Burglary	4	4			4				
Carrying concealed weapons	5	1		4					
Decoying child	2		2						
False pretense	1	1		1					
Forgery, 3rd degree	5	5			5				
Gaming	3	3							3

CIRCUIT COURT OF MARENGO COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.			
						Death.	Peniten- tary.	Hard Labor.	Jail.	Fines Paid or Secured.	Negro.	White.	Acquittals.
Larceny, grand	7	4	1	1			2	2					
Manslaughter, 1st degree	1	1					2						
Murder, 2d degree	1						1						
Murder, 1st degree	1	1			1								
Presenting fire arms	3			3									
Prohibition law, violating	6	2	1	3				1		1			
Rape	1			1									
Road law, violating	3			3									
Tick law, violating	1		1										
Totals	55	27	8	18	1	1	14	3		10			
Percentage of convictions, 49. Predominant crime, Grand Larceny.													
CIRCUIT COURT OF MARION COUNTY. J. M. Pennington, Solicitor (14th Circuit).													
Abusive language	1	1		1						1			1

CIRCUIT COURT OF MARSHALL COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.					
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Fines Paid or Secured.		Negro.		White.	
										Convic- tions.	Acquittals.	Convic- tions.	Acquittals.	Convic- tions.	Acquittals.
Burglary	1	1					1							1	
Carrying concealed weapon	6	6								2				5	
Disturbing religious worship	2			2											2
Embezzlement	1				1										
False pretense	3			3											3
Gaming	21	15		6						9				14	
Larceny, grand	3		2	1											
Larceny, petit	14	4		10						3	1			3	1
Malicious mischief	1			1											
Manslaughter, 1st degree	3	3					3							3	
Murder, 1st degree	2			1	1										
Murder, 2nd degree	2		1	1											1
Perjury	2		1	1											1
Prohibition law, violating	16	6	1	6	3					4			6	7	6
Prohibition law, possessing still	2			2											2
Prohibition law, distilling	14	5	3	7			5							3	11
Public drunkenness	19	9	1	9									6	7	5

Road law, violating	2	1	1	1	1	1	1	1
School house, injuring	10	1	3	6	1	1	1	6
Seduction	7		1	6				4
Selling mortgaged property	5		1	3				3
Tick law, violating	4	3		1			3	1
Trespass	6		2	4				6
Totals	194	71	17	99	7	10	4	64

Percentage of convictions, 36.5. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF MOBILE COUNTY.

Bart B. Chamberlain, Solicitor (13th Circuit).

Abusive language	8	6	2	2	2	4	1	5	2
Adultery	13	11	2				4	7	2
Affray	1	1						1	
Arson, 1st degree	2	2					2	1	
Arson, 2nd degree	1	1					1	1	
Assault to rob	3	3						3	
Assault with weapon	8	8					3	5	4
Assault to murder	16	14	1	1			10	4	3
Assault and battery	19	17		2			7	2	12
Auto, using without owner's consent	4	3		1			3		
Auto law, violating	4	3		1			1	2	1
Bastardy	2			2					
Bigamy	1	1					1		1

CIRCUIT COURT OF MOBILE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Abated or Withdrawn.	Number Sentences to				Color.			
					Death.	Penitentiary.	Hard Labor.	Fines Paid or Secured.	Negro.		White.	
									Convictions.	Acquittals.	Convictions.	Acquittals.
Burglary	51	42	9			37	5		31	6	11	3
Carnal knowledge	2	1		1		1					1	
Carrying concealed weapon	6	4	1	1			2	1	3		1	1
Check, giving worthless	2	2						2			2	
Contempt of court	2	2						1	1		1	
Crime against nature	1		1						1			1
Decoying child	1											
Defacing public property	3	1		1				1	1			
Defamation	3	3		1								
Electricity, unlawfully using	1	1										
Embezzlement	6	4		2			4		3		1	
Escape	2	2				1		1			2	
False pretense	2	1	1			1			1	1		
Fence, destroying	1											
Forgery	15	11	1	3		10		1	6	1	5	
Gaming	2	1		1							1	
Gaming, permitting	1	1						1	1		1	

[illegible]

CIRCUIT COURT OF MONROE COUNTY.
G. O. Dickey, Solicitor (21st Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Color.				
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Negro.		White.		
										Convic- tions.	Acquittals.	Convic- tions.	Acquittals.	
Animals, injury to	2	2	1	1										2
Assault with weapon	13	10		3						10	10	3		
Assault and battery	5	3	1	1					2	1	1		2	1
Assault to rape	2	1	1			1					1	1		
Assault to murder	3		1	2										1
Bastardy	2	1			1					1	1			
Burglary	1	1								3	3		1	1
Carrying concealed weapons	9	6	2	1						3	2		1	1
Disturbing religious worship	3			3										
Escape	1			1										
Indecent exposure of person	1			1										1
Injury to property	1	1	1							1			1	
Larceny, grand	12	6		6									5	
Larceny, petit	13	11		2					5	11	10	1		2
Manslaughter, 1st degree	2	2				1				1	2			
Manslaughter, 2d degree	1	1								1	1			

[illegible]

Percentage of convictions, 57.8. Predominant crime, Larceny.

CIRCUIT COURT OF MONTGOMERY COUNTY.

Wm. T. Seibels, Solicitor (15th Circuit).

Abusive language	2	1	1	1	1	1	1
Adultery	2	2	2	2	2	2	2

[illegible]

Percentage of convictions, 58.5. Predominant crime, Larceny.

CIRCUIT COURT OF MORGAN COUNTY.

D. C. Almon, Solicitor (8th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.				
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Negro.		White.		
										Convi- tions.	Acquittals.	Convi- tions.	Acquittals.	
Abusive language	7	4	.....	3	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Adultery	4	2	.....	2	.....	.....	.....	.....	.....	2	.....	2	2	.....
Animals, using temporarily	1	1	.....	.....	.....	.....	.....	.....	.....	1	1	.....	.....	.....
Assault	2	.....	.....	2	.....	.....	.....	.....	.....	.....	.....	.....	2	.....
Assault to murder	7	2	2	3	.....	.....	2	.....	.....	.....	1	4	.....	1
Assault with weapon	5	4	.....	.....	.....	.....	1	.....	.....	1	2	1	2	.....
Assault and battery	4	1	.....	3	.....	.....	.....	.....	.....	1	.....	.....	1	3
Assault to rape .....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Bastardy	1	1	.....	.....	.....	.....	.....	.....	.....	.....	1	.....	.....	.....
Burglary	25	15	6	4	.....	.....	13	.....	.....	.....	5	5	8	5
Carrying concealed weapon	6	4	.....	2	.....	.....	.....	.....	.....	1	1	2	3	.....
Concealing dead body	1	.....	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	1
Disturbing religious worship	1	1	.....	.....	.....	.....	.....	.....	.....	1	.....	.....	1	.....
Election, betting on	1	1	.....	.....	.....	.....	.....	.....	.....	1	.....	.....	1	.....
False pretense	3	.....	.....	2	1	.....	.....	.....	.....	.....	.....	.....	2	1
Forgery	5	5	.....	.....	.....	.....	5	.....	.....	.....	3	.....	2	.....

Gaming	25	20	2	3						20	10	1	10	4
Gaming table, operating	2			2										2
Junk dealer, failing to keep record	1			1										1
Larceny, grand	20	17	1	2		16				1	12	1	5	2
Larceny, petit	6	3	2	1						2			3	3
License, doing business without	1			1										1
Manslaughter	4	2	1			2					1		1	1
Murder	6	2	4			2					1	2	1	1
Perjury	1		1											1
Prohibition law, violating	49	25	8	16						24	12	15	12	9
Prohibition law, having still in possession	2	2								2			2	
Public drunkenness	11	8	1	2						8		1	8	2
Receiving stolen property	1	1								1			1	
Reckless driving	1			1								1		
Road law, violating	5	4		1						3		2	3	
Seduction	1	1				1							1	
Selling mortgaged property	1	1								1	1			
Shooting across public road	1		1									1		
Slander	1	1								1	1			
Sunday law, violating	4	2		2						2			2	2
Vagrancy	1	1								1			1	
Totals	217	131	31	53		41				78	54	40	76	41

Percentage of convictions, 60.3. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF PERRY COUNTY.
J. F. Thompson, Solicitor (4th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.					
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Fines Paid or Secured.	Negro.		White.		
											Convic- tions.	Acquittals.	Convic- tions.	Acquittals.	
Abusive language	1	1	1								1				
Animals, injury to	1	1	1							1	1				
Assault and battery	8	5		3						5	5	3			
Assault to rape	2	1	1	1			1				1	1			
Assault with weapon	12	9		3				1		8	7	3	2		
Burglary	2	1	1	1						1	1	1			
Carrying concealed weapon	11	7		4						7	7	4			
Detaining child	1	1	1							1			1		
Embezzlement	1		1												1
Escape	2	2						2							
Felony, attempt	1	1	1							1	1				
Forgery, 3rd degree	2	2						2						2	
Gaming	9	4		5						1	1	8			
Larceny, grand	7	3	1	3			1	2			3	4			
Larceny, petit	11	10	1					3		7	10	1			
Manslaughter, 1st degree	1	1	1					1			1		1		

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CIRCUIT COURT OF PICKENS COUNTY.
B. G. Wilson, Solicitor (17th Circuit).

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CIRCUIT COURT OF PICKENS COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.		Negro.	Convictions.	Acquittals.	White.
Carrying concealed weapon	4	3	1							3				
Failure to pay vehicle tax	2	2								1				
Gaming	1		1											
Larceny, petit	2	2								2				
Manslaughter, 1st degree	1	1					1							
Murder, 1st degree	1	2					1							
Murder, 2nd degree	5	3			2		3				2			
Prohibition law, violating	7	3	2	2						3	2			
Prohibition law, distilling	5	3	2				5				2			
Road law, violating	1			1										
Trespass	2			2										
Totals	37	24	4	8	2		10			14	4			

Percentage of convictions, 64.8. Predominant crime, Violating Prohibition Law.

Assault and battery	3	3	1	1				3		3
Assault to rape	2		1	1					1	1
Assault to murder	11	4	1	2	4		4		5	
Assault with weapon	7	7						7	3	4
Auto law, violating	1			1				1		
Burglary	3		2	1						
Carrying concealed weapon	4		2		2					1
Disturbing religious worship	9	1		8				1	1	
False pretense	1	1						1		1
Forgery	6	4	1	1			4		1	3
Larceny, grand	10	7	1	2			8		5	3
Larceny, petit	2	2						2		2
Murder, 1st degree	2	2					1			1
Murder, 2nd degree	1	1					1		1	
Presenting gun	1			1						
Prohibition law, violating	6	4		2				1	3	1
Prohibition law, distilling	34	33	1	1		24			9	5
Perjury	7	6		1		6				10
Public drunkenness	2	2						2		6
Railroad, placing obstruction on	1			1						2
Rape	2	1	1			1			1	1
Receiving stolen property	1	1						1	1	
Food law, violating	2	2						2		2
Robbery	2	2				2				2
Seduction	2			2						

CIRCUIT COURT OF RANDOLPH COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.				
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Fines Paid or Secured.	Negro.		White.	
											Convic- tions.	Acquittals.	Convic- tions.	Acquittals.
Shooting into dwelling	2	1	.....	1	.....	.....	.....	.....	.....	1	1	.....	.....	.....
Stock law, violating	1	.....	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Trespass	1	.....	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Totals	133	87	10	31	6	.....	51	4	.....	23	32	9	42	3

Percentage of convictions, 65.4. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF RUSSELL COUNTY.

T. M. Patterson, Solicitor (3rd Circuit).

Adultery	4	4	.....	.....	.....	.....	.....	.....	.....	4	2	.....	2	.....
Assault and battery	3	3	.....	.....	.....	.....	.....	3	.....	1	1	.....	1	.....
Assault to murder	5	1	2	2	.....	.....	.....	.....	.....	1	.....	1	1	1
Assault to rape	1	1	.....	.....	.....	.....	1	.....	.....	.....	1	.....	.....	.....
Burglary	5	2	1	2	.....	.....	1	1	.....	.....	2	1	.....	.....
Carnal knowledge	2	1	.....	1	.....	.....	1	.....	.....	.....	1	.....	.....	.....

Carrying concealed weapon	8	5	1	2					2		3	4	1	1	
Embezzlement	2			2											
Escape	1	1									1	1			
Fence, destroying	1		1										1		
Gaming	7	7									7	1		6	
Gaming table, keeping	3		2	1									1		1
Larceny, grand	4	2	1	1					2			2	1		
Larceny, petit	4	3		1							3	3			
Manslaughter, 1st degree	2	1		1					1			1			
Murder, 1st degree	3			3											
Murder, 2nd degree	3	3							3			3			
Prohibition law, violating	33	10	4	19					2		8	1		9	4
Prohibition law, distilling	16	9	5	2					1	8		9	5		
Religious worship, disturbing	1	1									1	1			
Robbery	6	6							6					6	
Selling mortgaged property	1	1									1	1			
Shooting across public road	2	1		1							1			1	
Stock law, violating	1	1									1			1	
Stolen goods, receiving	3		1	2											1
Sunset law, violating	1	1									1	1			
Trespass	3	1		2							1	1			
Vagrancy	10	1	1	8							1	1			1
Totals	135	66	19	50					16	16	35	38	11	28	8

Percentage of convictions, 48.8. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF SHELBY COUNTY.

W. W. Wallace, Solicitor (18th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.	Fines Paid or Secured.	Convictions.	Acquittals.	White.
Abusive language	7	5		2						5	5		2
Animals, injury to	2		2									1	1
Assault and battery	1			1									
Assault with weapon	10	6		4	1					6	5	2	1
Assault to rape	1			1									
Assault to murder	10	2		8			2				2	2	
Burglary	3		1		2							1	
Carrying concealed weapon	10	5		4	1					5		2	2
Disturbing religious worship	4	4								4			
Embezzlement	1			1									2
Escape	2			2									1
False pretense	1			1									1
Forgery	3			3									3
Larceny, grand	12	3		6	3		3				2	2	1
Larceny, petit	12	11		1						11	1		10
License, doing business without	7	1				6							1

[illegible]

Percentage of convictions, 41.4. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF ST. CLAIR COUNTY.

M. C. Sivley, Solicitor (16th Circuit).

Abusive language	7	1					6		6
Affray	2	1	1				1	1	1
Assault and battery	6	6					6		4
Assault to murder	1	1			1			1	
Auto law, violating	2	2					2		1
Burglary	5	3	1	1	3			2	1
Carrying concealed weapon	1	1					1		1
Disturbing religious worship	6	4	1	1		1	4		4

CIRCUIT COURT OF SUMTER COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.				Color.		Acquittals.	Convictions.	White.	Acquittals.	Convictions.
						Death.	Penitentiary.	Hard Labor.	Jail.					Negro.	White.					
Raffling	2	2								2										
Road law, violating	3			3																1
Receiving deposits after insolvency	6			6																
Receiving stolen property	1	1					1													
Removing mortgaged property	1				1															
Robbery	1			1																
Shooting across road	1	1								1										
Slot machine, operating	1	1								1							1			
Tick law, violating	1	1								1							1			
Trespass	2	1	1							1										
Totals	123	69	6	40	5		16	6		46				8		7				1

Percentage of convictions, 56. Predominant crime, Larceny.

[illegible]

Percentage of convictions, 54.7. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF TUSCALOOSA COUNTY.

E. L. Clarkson, Solicitor (6th Circuit).

Abusive language	54	47	1	6				44	1	46	2
Adultery	5	4		1				4		4	
Animals, injury to	4	3	1					3	1	2	
Assault and battery	23	14	2	6	1			1	14	9	2
Assault with weapon	27	20	1	6				7	2	11	9
Assault to murder		2					1		1	2	
Burglary	82	48	1	13	20		7	33	1	9	36
Carrying concealed weapon	31	18	1	8	4		3		17	17	1
Cutting trees	1			1							
Defamation	2			2							
Embezzlement	3		1	2							
Escape	1		1								1
False pretense	29	10	2	14	4				8	8	2
Forgery	14	7	7	4	3		2	2	2	6	
Game law, violating	1			1							
Gaming	7	4	1	1	1				4	4	1

CIRCUIT COURT OF TUSCALOOSA COUNTY.—Continued.

Character of Offense	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.					
						Death.	Peniten- tiary.	Hard Labor.	Jail.		Negro.		White.			
											Convic- tions.	Acquittals.	Convic- tions.	Acquittals.		
Interfering with lawful enterprise	1	1					1			1						
Larceny, petit	19	5	2	10	2			1	1	5	3	1	2			
Manslaughter, 1st degree	1	1					1						1			
Murder, 1st degree	11	10			1		10				5		1			
Obstructing public road	1			1												
Mining law, violating	1	1						1					1			
Perjury	2	1		1						1		1				
Prohibition law, violating	47	20	3	18	6			12	2	17	15	3	8			
Prohibition law, distilling	21	9	3	6	3		1	5		6	2	1	8			2
Pool, permitting minor to play	1		1													1
Practicing medicine without license	2			2												
Quarantine law, violating	3	3								3	3					
Rape	3	2		1				1		2	1		1			
Receiving stolen property	4			4												
Revenue law, violating	1			1												
Robbery	2	1	1				1					1	1			

[illegible]

Percentage of convictions, 55.8. Predominant crime, Burglary.

CIRCUIT COURT OF WALKER COUNTY.

J. M. Pennington, Solicitor (14th Circuit).

Abusive language	5	4	1				4	4
Adultery	6	4	2				4	2
Animals, cruelty to	3		3					
Assault and battery	24	20	4	7			20	15
Assault to murder	3		2	1				
Assault to rape	1		1					
Bigamy	1	1		1				1
Burglary	8	8		8			2	1
Carrying concealed weapon	3	3					3	3
Desertion	1		1					
Embezzlement	3		3					
Forgery	2	2		2				
Larceny, grand	12	5	4	5			2	5
Larceny, petit	9	8	1				4	2
Manslaughter, 1st degree	2	2		2			1	1

CIRCUIT COURT OF WALKER COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
					Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Negro.	White.
Murder, 2nd degree	3	1	.....	2	.....	1	.....	.....	.....	.....	.....	1	.....
Perjury	1	.....	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	.....
Prohibition law, violating	30	9	7	14	.....	.....	.....	.....	2	.....	.....	.....	2
Selling mortgaged property	3	.....	1	2	.....	.....	.....	.....	.....	.....	.....	.....	.....
Tick law, violating	1	.....	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	.....
Trespass	2	.....	.....	2	.....	.....	.....	.....	.....	.....	.....	.....	.....
Vagrancy	1	.....	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	.....
Totals	124	67	13	41	3	19	7	4	45	25	36	.....	6

Percentage of convictions, 54. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF WASHINGTON COUNTY.

F. E. Poole, Solicitor (1st Circuit).

Abusive language, using	2	.....	.....	1	1	.....	.....	.....	.....	.....	.....	.....	2
Animals, injury to	1	1	.....	.....	.....	.....	.....	.....	.....	1	.....	.....	.....
Assault and battery	2	.....	1	1	.....	.....	.....	.....	.....	.....	1	.....	1

Assault with weapon	5	3	1	1	1	2	1	1	1	1
Assault to murder	2		2	1			1	1		1
Assault to rape	1		1				1			
Carrying concealed weapons	9	6	3				1	3	1	
Cattle, failure to dip	2		2					5		2
Firearms, discharging	3	3						1		
Larceny, petit	7	3	2	1	1		2		3	2
Marking lamb	1		1							1
Miscegenation	2		2							2
Murder	5	4	1			2		1	1	3
Prohibition law, violation	1	1						1		
Road, failure to work	1		1							1
Selling mortgaged property	1		1							1
Train, jumping moving	1	1						1	1	
Trespass	3	1		2					1	1
Totals	48	23	4	19	4	2	3	12	11	15

Percentage of convictions, 47.9. Predominant crime, Carrying Concealed Weapon.

CIRCUIT COURT OF WILCOX COUNTY.

J. F. Thompson, Solicitor (4th Circuit).

Abusive language	1			1						1
Adultery	1	1					1			1
Animals, injury to	2	2					2	2		

[illegible]

Percentage of convictions, 80. Predominant crime, Assault with Weapon.

CIRCUIT COURT OF WINSTON COUNTY.

J. M. Pennington, Solicitor (14th Circuit).

Abusive language	11	9	1	1					9	9
Adultery	1	1								1
Assault and battery	9	9							9	8
Assault with weapon	2	2							2	2
Burglary	3			2	1					
Carrying concealed weapon	5	2		3					3	2
Embezzlement	2	1	1						1	1
Gaming	2				2					
Larceny, grand	2	1		1				1		1
Murder, 1st degree	2		2							2
Presenting gun	1	1							1	
Prohibition law, violating	20	6	3	10	1			1	1	2
Public drunkenness	7	3	2	3	2				3	2
Totals	67	35	9	20	6			2	29	26

Percentage of convictions, 52. Predominant crime, Violating Prohibition Law.

GENERAL SUMMARY OF CASES—1918-1920.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.						
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Negro.		White.				
										Convic- tions.	Acquittals.	Convic- tions.	Acquittals.			
Abandonment	21	4	2	14	1			3		2				2		3
Abduction	3		1	2												1
Abortion, procuring	1						1								1	
Abusive language	333	180	40	97	19			8		152		18	8	139	40	
Adultery	119	52	17	40	9		1	4	3	41		14	9	25	14	
Advertising law, violating	1			1												
Affray	10	4	3	3					1	4		1	1	5	1	
Animals, injury to	47	17	11	14	5					14		10	3	5	8	
Animals, trading diseased	1				1											
Arson, 1st degree	13	5	1	6			5					3	1	2	2	
Arson, 2nd degree	12	3	3	4	2		2	1				2	2	1		
Arson, 3rd degree	1			1												
Assault	49	34	4	11				3	1	26		1	1	17	1	
Assault and battery	423	311	26	72	9			52	18	246		127	8	108	24	
Assault to murder	267	88	53	109	20		63	15		11		47	31	13	25	
Assault to rape	39	18	8	12			13	3				14	12	2	3	
Assault to rob	10	5	2	3			5					1	1	1		

Assault with weapon	470	318	54	76	19	1	30	5	274	143	12	91	10
Auto law, violating	44	15	7	14	8		1		13	7	1	4	2
Bail, forfeiture	3	1							1			1	
Bastardy	55	18	9	15	13			1	9	8	7	4	3
Bawdy house, keeping	1				1								
Bestiality	1												
Betting at public place	24	8	1	15					1		1	1	1
Bigamy	23	14		4	2		13	3		6	1	6	
Blackmail	1	3		1									
Blue Sky law, violating	1	1							1			1	
Bribery	3			3									
Burglary	640	426	61	112	55		277	125	9	22	217	42	17
Burning insured dwelling	2			2									
Carnal knowledge	24	7	8	9			6		1	3	3	2	1
Carrying concealed weapon	519	320	47	122	31			38	2	270	159	36	23
Champerty	1			1									
Checks, issuing worthless	22	14	1	8				5	2	7	2	7	
Concealing dead body	1			1									1
Conspiracy	15	10	1	4	1			4				5	5
Contempt of court	3	3							10				
Contract, violating written	2		1		1			1	2	1	1	2	
Crime against nature	3	1	1	1			1			1			
Cutting trees	1			1									
Decoying child	7	1	2	3	1				1			1	
Defacing building	14	2	3	7	2			1	1	1			6

GENERAL SUMMARY OF CASES—1918-1920.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Peniten- tiary.	Hard Labor.	Jail.		Negro.		White.	
											Convic- tions.	Acquittals.	Convic- tions.	Acquittals.
Defamation	21	6	4	4	6					6			6	2
Detaching train	1			1										
Discharging fire arms	2			1	1									
Disturbing religious worship	81	40	7	26	6			4		31	4		28	11
Disturbing women in public place	3	2		1						1	1			
Dog tax, failure to pay	8			7	1							1		
Drug store, operating without pharmacist	2			1									1	
Elections, betting on	1	1								1			1	
Electricity, unlawfully using	1	1											1	
Embezzlement	134	20	7	100	8					4	6	3	7	21
Escape	36	22	1	9	3					3	16	2	6	1
False pretense	152	40	16	85	12					19	25	5	9	16
Felony, attempt	14	14						6		8	6		4	
Fence, destroying	8	3	2	1	2			1		3	1	1	2	3
Fighting cocks	6	2		2						2				
Fighting in public place	1			1										
Food law, violating	4	1	1	3						1			1	1

Forgery, 1st degree	159	101	5	43	9	80	9	2	4	48	5	21	11
Forgery, 2d degree	37	17	3	15	1	12	5	.....	1	.....	.....	7	2
Forgery, 3d degree	15	9	.....	6	.....	5	4	.....	.....	2	.....	2	.....
Forgery, attempt	1	1	.....	.....	.....	.....	.....	.....	1	.....	.....	1	.....
Game law, violating	3	2	.....	1	.....	.....	.....	.....	2	2	.....	.....	.....
Gaming	232	116	14	94	11	.....	1	.....	97	41	19	56	16
Gaming, permitting	2	1	1	.....	.....	.....	.....	.....	1	.....	.....	1	1
Gaming table, keeping	9	1	2	5	1	.....	2	.....	.....	.....	1	.....	4
Hunting without permit	2	1	1	1	1	.....	.....	.....	1	1	1	.....	.....
Incest	3	1	1	1	1	.....	.....	.....	.....	1	.....	.....	.....
Indecent exposure of person	1	.....	.....	1	1	.....	.....	.....	.....	.....	.....	.....	1
Interference with lawful enterprise	1	1	.....	.....	.....	1	.....	.....	1	.....	.....	.....	.....
Junk dealer, failing to keep record	1	.....	.....	1	1	.....	.....	.....	.....	.....	.....	.....	1
Keeping barred room	1	.....	.....	1	1	.....	.....	.....	.....	.....	.....	.....	1
Lambs, wrongful marking	1	.....	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	1
Larceny, grand	937	515	145	239	29	342	146	1	31	236	82	96	44
Larceny, petit	510	361	36	103	12	.....	91	40	250	189	24	91	21
Larceny, attempt	1	1	.....	.....	.....	.....	.....	.....	1	1	.....	.....	.....
Libel	2	.....	.....	2	.....	.....	.....	.....	.....	.....	.....	.....	.....
License, doing business without	53	22	3	17	7	2	.....	.....	17	4	.....	8	5
Liquors, condemnation	47	47	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Lottery	7	6	.....	1	.....	.....	.....	.....	6	.....	.....	5	.....
Malicious mischief	24	12	3	4	3	.....	1	.....	8	1	.....	7	3
Manslaughter, 1st degree	102	88	6	6	1	82	6	.....	1	46	2	19	4
Manslaughter, 2d degree	53	40	6	2	4	.....	27	4	20	16	2	10	2

GENERAL SUMMARY OF CASES—1918-1920.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.				
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Negro.		White.		
										Convic- tions.	Acquittals.	Convic- tions.	Acquittals.	
Medicine, practicing without certificate	1	1							1	1				
Mining law, violating	2	2						1		1			1	
Minors, selling to unlawfully	3	5		1						5				1
Miscegenation	9	4		4	1		3			1				4
Murder, 1st degree	248	113	62	63	11	15	94				57	23	22	21
Murder, 2nd degree	160	103	34	17	3		101		2	3	59	9	22	6
Peace proceedings	5		2	2	1									2
Perjury	40	10	8	19	1		8			1	1	2	9	6
Poison, putting out	1	1								1			1	
Pool, permitting minor to play	12	4	2	6						4			3	1
Presenting gun	50	20	10	19	1		1	1		15	7	4	9	5
Profiteering	1			1										
Prohibition law, violating	2206	1160	271	695	76		13	229	11	796	272	79	315	145
Prohibition law, distilling	404	268	63	60	16		171	36	3	40	105	38	98	55
Prohibition law, possessing still	9	4	1	5			2			2			4	3
Property, injury to	4	1	1							1	1		1	1
Property, using without permission	17	10		6	1			4		6	5			
Public drunkenness	273	162	31	82	5			1		125	9	5	96	29

Quarantine law, violating	5	3	2					3	3					
Raffling	2	2							2					
Railroad, obstructing	1			1										
Rape	17	6	6	5		4	1		2	4	3	2	2	2
Receiving deposit for insolvent bank	8			8										2
Reckless driving	12	6		6					6	3	1			
Removing land line	3	1	1	1										
Removing mortgaged property	7	2		4	1									
Resisting officer	19	8	1	11	2		2		2	5	2			
Revenue law, violating	28	6	2	20					2	2				6
Road law, violating	147	74	22	55	2		1		61	27	15	40	30	
Road, obstructing	6	1	2	2	1				1		1	1	2	
Robbery	89	37	21	27	4	2	36			13	12	9	6	
School law, violating	2	1		1					1			1		
Seduction	36	7	6	22	1		7		1		1	9	7	
Selling mortgaged property	53	12	10	26	5		1	1	9	4	2	4	9	
Selling property of co-tenant	1		1								1			
Selling property under lien	15	1	3	10	1			1		1	1		1	1
Shooting across public road	23	14	2	7					14	3	2	6	6	
Shooting into dwelling	16	6	3	6	1			2	4	5	2		2	2
Shooting, etc., into train	2	2						1	1		2			
Shooting into school house	1	1							1	1				
Slander	3	1		2					1	1			1	1
Slot machine, operating	13	13									1		10	
Sodomy	4	4					3	1		3				

GENERAL SUMMARY OF CASES—1918-1920.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Color.				
						Death.	Peniten- tiary.	Hard Labor.	Jail.	Negro.		White.		
										Convic- tions.	Acquittals	Convic- tions.	Acquittals	
Soliciting labor	6	2	1	3						2	2	1		
Stock law, violating	27	11	2	4	10			2		11	1		9	4
Stolen property, bringing into state	47	32	3	12			6	19	3	4				
Stolen property, buying, etc.	116	76	8	28	2		35	27	7	10	26	7	15	3
Sunday law, violating	26	16		11						14	6		9	3
Sunset law, violating	3	2		1						2	1		1	1
Threatening letter, sending	4	2	1	1						3	2			
Tick law, violating	200	31	56	93	19			1		20		1	26	12
Trains, riding	6	4			1			3		1	1		4	
Trespass	90	17	20	53				3		13	6	5	8	15
Vagrancy	199	40	29	119	13			9	1	26	13	7	12	8
Vehicle tax, failure to pay	2	2								1				
Voting, illegal	1			1										
Wild hog law, violating	2		1	1										
Wrecking trains	1	1			1									
Totals	10607	5689	1319	3095	497	17	1414	978	120	2854	2084	557	1740	763

Percentage of convictions, 53.6. Predominant crime, Violating Prohibition Law.

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